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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANN DANIEL AND LEONARD HILL,

Petitioners,

v.

COUNTY OF SANTA BARBARA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a county may take a permanent easement over private property, and thereby deprive the owner of the right to exclude, without satisfying either the nexus or proportionality requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) or *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and without paying just compensation, solely because 11 years earlier the State was able to extort from a prior owner an offer to dedicate that easement, not for any consideration but by sheer intimidation and threats of significant fines?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption. The following were named with respondent as defendants-appellees in the proceedings before the United States Court of Appeals for the Ninth Circuit: "All Persons Unknown, Claiming any Right, Title Estate Lien or Interest in or to the within Described Property" and "Does, 1-1000 inclusive."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ann Daniel and Leonard Hill, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) was entered on April 18, 2002, and is reported at 288 F.3d 375 (9th Cir. 2002). This opinion replaced a previous opinion of the court of appeals that was entered on March 12, 2002, and is available at 2002 WL 378131. The order of the court of appeals denying the petition for rehearing and the suggestion for rehearing *en banc*, and withdrawing and replacing its prior opinion (Pet. App. 1a-2a) was entered April 18, 2002, and is reported at 288 F.3d 375 (9th Cir. 2002). The opinion of the United States District Court for the Central District of California, granting respondent's motion to dismiss petitioners' Fifth Amendment takings claim without leave to amend (Pet. App. 16a-46a), is not reported.

JURISDICTION

The court of appeals entered its judgment and its order denying petitioners' petition for rehearing and suggestion for rehearing *en banc* on April 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case presents a single question essential to the continued vitality of the promise of the Takings Clause: May local governments evade the restrictions on compelled dedication of public access easements that this Court announced in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), by taking private property in two discrete steps, each of which is immune from a takings challenge under the decision below? In *Nollan*, this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner grant the public an easement that was wholly unrelated to any adverse impacts caused by the proposed construction project. *Id.* at 837. This case involves a far more egregious scheme of extortion. Just days after this Court heard oral argument in *Nollan*, the Coastal Commission forced petitioners' predecessors-in-interest to record an offer to dedicate an easement passing directly through their yard – an offer that would expire in 25 years unless accepted by another local governmental entity. The Commission gave *no* consideration in exchange for this offer to dedicate; petitioners' predecessors only recorded the offer under threats of significant fines.

The court of appeals ruled that, 11 years after *Nollan*, the County of Santa Barbara was free to accept this coerced offer to dedicate without paying a penny of compensation for the resulting easement. According to the lower court, because no takings challenge was asserted against the *Commission's* 1987 coerced offer to dedicate, petitioners were barred from challenging the *County's* 1998 legally distinct governmental action of accepting that offer. Yet because the Commission's 1987 action did not strip the prior owners of any possessory interest in their property – indeed they were free to use and

exclude others from it – any challenge seeking redress for a physical taking was plainly unripe in 1987. Absent intervention by this Court, government entities across the nine western states within the Ninth Circuit will be free to accept hundreds of soon-to-expire offers to dedicate property, coerced in blatant violation of the restrictions announced in *Nollan*, without regard to the fundamental protection of property owners against uncompensated takings.

1. *The Regulatory Backdrop.* In the late 1970s, without legislative authorization, the Coastal Commission implemented a policy of refusing to issue building permits unless coastal property owners recorded offers to dedicate easements to the public. These offers were temporary in nature; if not accepted by a local agency within 21 years, they would automatically expire. Conversely, acceptance conveyed to the accepting agency actual title of the easement and the right to occupy it in perpetuity.

At the time these offers were coerced, their acceptance was uncertain for two reasons. First, an accepting entity had to ensure that it was able to assume the potentially significant liabilities and maintenance costs that attend ownership of public beach property. *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 14 (Cal. Ct. App. 1985). Second, because local governments would not accept an easement that the public could not reach (and thus could not use), acceptance of an offer to dedicate often depended on the Coastal Commission's ability to extort other offers to dedicate easements over neighboring properties. This, in turn, depended on whether the owners of such neighboring property would seek approval for some improvement to their property, and then succumb to the Commission's coercion. See generally *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592, 601-02 (Cal. Ct. App. 1985).

2. *Factual Background.* The petitioners own a single family home on a small parcel just 15 miles from the property at issue in *Nollan*. In 1987 petitioners' predecessors-in-

interest, the Bucklews, received a letter from the Coastal Commission demanding they immediately record an offer to dedicate an easement passing directly through their yard or face significant fines. The Commission did not predicate this threat on any action or request of the Bucklews, who had never sought the Commission's approval for any purpose. Instead, the Commission purported to rely on conditions imposed on permits issued over 10 years earlier to the Bucklews' predecessor-in-interest, Johnson. For unexplained reasons, the Commission never requested that Johnson execute or record either of these offers.[1] More than a decade after Johnson was issued the second of these permits, and while the *Nollan* case was pending before this Court, the Commission threatened the Bucklews with a fine of $10,000, plus additional fines of $5,000 per day thereafter, unless they executed the offer to dedicate that the Commission had demanded 10 years earlier from Johnson. In the face of this threat, the Bucklews signed and recorded an offer to dedicate a public lateral easement, unsupported by any consideration, passing directly across their yard. This offer was to expire unless it was accepted by a public agency within 25 years of recordation, a condition that effectively added 13 additional years to the offer the Commission had originally coerced from Johnson. Notably, the Commission extracted this offer just one week after oral argument had taken place before this

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[1] Johnson sought Commission approval in 1974 for a permit to subdivide his parcel into four separate lots. Approval of that permit was conditioned upon Johnson offering to dedicate the same type of easement as the one at issue in this case. Johnson appealed that condition to the Commission, but was unsuccessful. Nevertheless, he proceeded with the subdivision of his parcel. For unexplained reasons, the Commission never requested he execute and record an offer to dedicate. In 1977, Johnson again sought Commission approval, this time for a permit to construct a residence on one of his newly divided parcels. Once again, the Commission conditioned approval of this permit upon his offering to dedicate the same type of easement as the one at issue in this case. Johnson proceeded with construction of the residence, but once again the Commission did not seek to implement this condition.

Court in *Nollan*, a fact the Commission neglected to mention to the Bucklews.

By the late 1990s, the Commission had collected over 1,200 offers to dedicate public easements across private coastal property, the vast majority of which had not been accepted. Realizing that hundreds of outstanding offers to dedicate would soon expire, the Coastal Commission began urging local governments to expedite the acceptance process for all offers pending in their respective jurisdictions. On September 15, 1998, the County of Santa Barbara suddenly notified petitioners that it intended to conduct a public hearing on October 6, 1998, to consider whether to accept 72 outstanding offers to dedicate easements over coastal property located in the County, including the offer to dedicate recorded by the Bucklews. The petitioners were surprised, since they had good reason to believe that the County would not flaunt *Nollan* and try to enforce the pre-*Nollan* offer.

On October 5, 1998, petitioners recorded a Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement with the Santa Barbara Recorder's Office. The Notice was recorded to give effective legal notice to all interested parties of petitioners' claim that the offer to dedicate was invalid given its failure to comport with the restrictions announced in *Nollan* and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). On the same day the Notice was recorded, petitioners sent the Notice to the County, advising it that they had revoked the offer. Pet. App. 24a.

The County proceeded with its efforts to accept the offer to dedicate that the Coastal Commission had originally extracted from the Bucklews, despite the petitioners' appearances before the County – in person and in writing – asking that it *not* accept the offer. On October 20, 1998, the County brushed aside petitioners' pleas and adopted a resolution accepting the easement across their property. In so doing, the County refused to consider whether acceptance would violate petitioners' constitutional rights in light of *Nollan* and *Dolan*.

The County made no effort to show that its acquisition of the easement satisfied the nexus or proportionality requirements of the Fifth Amendment and instead simply recorded its acceptance of the offer to dedicate.

On November 24, 1998, the Commission issued petitioners a "cease and desist" order, directing them to cancel their Notice of Revocation and to refrain from engaging in any further activities that would be inconsistent with the previously recorded offer to dedicate. This order exposed petitioners to civil penalties of up to $6,000 a day for failure to comply and up to $15,000 per day for failure to comply with the original permit condition. See Cal. Pub. Res. Code §§ 30821.6 & 30820(b).[2] Faced with this threat, petitioners withdrew the Notice.

3. *Proceedings Below.* Petitioners filed this action against the County less than 30 days after it accepted the offer to dedicate. The complaint, as amended, alleged that the County's acceptance of the offer to dedicate constituted a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and sought, *inter alia*, injunctive and declaratory relief under 42 U.S.C. § 1983.

The County filed a motion to dismiss. Notably, it did not contend that its acceptance of the offer to dedicate was lawful under *Nollan* and *Dolan*. Instead, the County alleged, *inter alia*, that petitioners' challenge was an untimely and improper collateral attack on the *extorted offer to dedicate* and thus was barred by principles of res judicata and waiver. Relying on Section 30801 of the California Public Resources Code, which governs judicial review of Coastal Commission decisions, the County argued that any taking challenge

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[2] These threats were not fanciful. The Commission recently brought suit seeking fines amounting to potentially tens of millions of dollars against an individual property owner who attempted to rescind a similar offer. *See* Petition for a Writ of Certiorari at 19, *Cole* v. *County of Santa Barbara*, No. 01-1173 (U.S. filed June 3, 2002).

petitioners asserted could only have been brought within 60 days of the Coastal Commission's extraction of the 1987 offer. Petitioners opposed the motion, noting that their challenge was to the *County's* 1998 acceptance of the exacted offer, a challenge which was plainly timely under 42 U.S.C. § 1983. Nevertheless, on October 14, 1999, the United States District Court for the Central District of California granted the County's motion to dismiss petitioners' complaint.

The Ninth Circuit affirmed that judgment in an opinion filed on April 18, 2002.[3] Significantly, the court of appeals' decision did not dispute petitioners' showing that, long after the *Commission* extracted the 1987 offer, they retained valuable property rights in the portion of the land subject to the offer, and that those rights were not extinguished until 1998, when the *County* accepted the offer. Instead, the court held that any challenge to the County's acceptance was an impermissible attempt by petitioners to revive the time-barred claims of their predecessors-in-interest, *viz.*, petitioners' attack on the County's acceptance was an attack on the offer the Commission extracted from the Bucklews in 1987. Pet. App. 6a.

Petitioners argued that forcing individuals to pursue a takings claim that sought compensation for the loss of the right to exclude as soon as an offer to dedicate was coerced would effectively force individuals to seek redress in the courts prematurely, and that such premature claims would be subject to dismissal on ripeness grounds. But the court of appeals dismissed this argument, stating that a ripe regulatory takings claim may have existed once the Commission affirmed the 1974 permit condition requiring the very first offer coerced from Johnson, for then "the conditions on which

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[3] The Ninth Circuit originally affirmed the judgment in an opinion filed on March 12, 2002. After petitions for rehearing with suggestions for rehearing *en banc* were filed by both parties, the Ninth Circuit withdrew its prior opinion and affirmed the judgment in the opinion it filed on April 18, 2002. *See* Pet. App. 1a-2a.

[petitioners' predecessors] would be permitted to subdivide [their] parcel were 'known to a reasonable degree of certainty,' and the Commission's action was final." Pet. App. 7a (citation omitted) (quoting *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 620 (2001)). The court then noted that, if petitioners' claim was analyzed as a physical taking, a claim could have ripened at the time the offers to dedicate were exacted from petitioners' predecessors-in-interest, *viz.*, in 1987. *Id.* at 9a.[4]

REASONS FOR GRANTING THE PETITION

The court of appeals adopted a procedural bar that shields from review, and thereby effectively sanctions, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property. That procedural bar allowed the County of Santa Barbara, in plain contravention of this Court's holdings, to take an easement without paying a penny in compensation, or making any showing that the easement was appropriately tied to any land-use request for which petitioners sought regulatory approval. The California Coastal Commission, moreover, has made clear its determination to preserve, by whatever means necessary, "the vitality of the many unaccepted offers of dedication" that it has previously coerced, and to encourage other local governmental bodies to accept as many of these soon-to-expire offers as possible. *Amicus Curiae* Brief of California Coastal Commission in Support of Respondent County of Santa Barbara at 2, *Cole* v. *County of Santa Barbara*, No. B147339 (Cal. Ct. App. Dec. 17, 2001). The Ninth Circuit's failure to prevent such an

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[4] The court of appeals also held that the injunctive and declaratory relief petitioners sought was not available under 42 U.S.C. § 1983. The question of what relief is available for a violation of the Takings Clause is before this Court in *Washington Legal Foundation* v. *Legal Foundation*, 70 U.S.L.W. 3751 (U.S. June 10, 2002) (No. 01-1325).

open flouting of this Court's rulings is a compelling ground, in and of itself, to warrant review of the decision below.

But the blatant disregard for this Court's precedents is not all that justifies plenary review of the decision below. The procedural bar adopted by the Ninth Circuit rests on two related errors of constitutional law, each of which warrants review by this Court. First, the lower court failed to recognize the legally distinct property deprivation that the County's 1998 conduct caused. Notwithstanding the Coastal Commission's 1987 coerced offer to dedicate an easement, from 1987 to 1998 petitioners and their predecessors continued to enjoy the right to use and exclude others from their property. It was not until the County's 1998 acceptance of the offer to dedicate that petitioners were stripped of these most fundamental of rights. By failing to recognize the separate and far more significant deprivation the County's conduct caused, the lower court allowed the County to violate petitioners' constitutional rights with impunity.

Moreover, the lower court's decision creates a procedural bar that is flatly irreconcilable with the ripeness doctrine as applied in the takings context. Because none of the Coastal Commission's various acts of coercion in the 1970s and 1980s stripped petitioners of their right to exclude others or compelled such a deprivation, no takings claim seeking compensation for the loss of this right could have been brought in any challenge prior to the County's 1998 decision to accept the offer. Plainly, any challenge to *County* conduct that did not occur until 1998, and that might never have occurred, was in no sense "ripe" in 1987 at the time the offer was coerced and was therefore non-justicable prior to 1998.

The erroneous decision below allowed the County to escape its "categorical duty" to pay compensation for an appropriation of property that "dispossess[ed] the owner [of its] right to exclude others," *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478, 1480 n.19 (2002), and improperly allowed the

Commission "to put an expiration date on the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001). Absent review by this Court, these constitutional violations will by no means be isolated. The decision below clears the way for the acceptance of hundreds of other coerced offers to dedicate easements that are due to expire in the next few years – offers that the Coastal Commission is making every effort to ensure are accepted. In addition, the court of appeals' decision provides a clear roadmap for other government entities in the nine western states of the Ninth Circuit to follow to escape the commands of *Nollan* and *Dolan* and appropriate valuable property rights without paying any compensation.

I. THE COUNTY'S ACCEPTANCE OF THE OFFER TO DEDICATE WAS ITSELF AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The decision below raises a fundamental question of constitutional law: when one governmental agency forces a property owner to record an *offer* to dedicate a public access easement that does not satisfy the substantial nexus requirement announced in *Nollan* and *Dolan*, and a separate governmental entity later *accepts* that offer, does the latter decision work a legally distinct deprivation of property without just compensation? The court of appeals concluded that it does not, and that any constitutional injury the property owner suffers stems from the initial decision to compel the offer. That conclusion, which is the central predicate underlying the procedural bar created by the court of appeals, is demonstrably wrong.

Although state law defines the property interests that the Takings Clause protects, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), whether and when a compensable taking has occurred are questions of federal law. In this case, the Coastal Commission did not require any of the prior property owners to convey title to the easement outright. Rather, it demanded that they record an

offer to dedicate an easement. By its terms, this offer to dedicate was made irrevocable for a period of 25 years; if it was not accepted during that period, the offer would expire.

It is a well-settled principle of California law that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to the easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). Rather, an unconditional acceptance is required to complete a dedication. *Baldwin* v. *City of Los Angeles*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted by a public agency"). Indeed, this is a principle the Commission itself explicitly recognizes: "[Offers to dedicate] are only *offers* of easements however. *The interest belongs to the property owner until the offer is accepted* by a government agency . . . ." California Coastal Commission Public Access Action Plan (June 1999), at 14 (second emphasis added), Pet. App. 47a.

The obvious corollary to this rule is that an offer to dedicate does not itself divest the property owner of the right to use or exclude others from that property. To the contrary, petitioners' immediate predecessors-in-interest, the Bucklews, retained the essential bundle of rights that attend ownership of property long after the 1987 offer was extracted. Indeed, in *Grupe*, the court explained that an offer to dedicate, such as the one at issue here, created "no easement and respondent can exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." 212 Cal. Rptr. at 592. See also *Whalers' Village Club*, 220 Cal. Rptr. at 15 (Commission abused its discretion in denying a landowner the right to exclude the public from

property prior to acceptance of an offer to dedicate, because such a denial improperly "turns the offer to dedicate public access into an immediate easement").

Accordingly, even after the Coastal Commission required the Bucklews to record an offer to dedicate an easement, they retained full use and possession of the property in question, including "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Nor did the Commission's exaction render the loss of these rights inevitable. To the contrary, the likelihood that the easement would be accepted was quite minimal. See *Grupe*, 212 Cal. Rptr. at 592, 601-02; see also *supra* at 3. And of course, if no public agency formally accepted the offer to dedicate within 25 years of recordation, the offer would expire by its terms and the property owner would retain title completely unburdened by the offer. See 212 Cal. Rptr. at 602.

It is thus clear that it was the County's acceptance of the offer to dedicate in October 1998, and not the Coastal Commission's 1987 exaction of that offer, that deprived petitioners of their right to use and to exclude others from their property. As a result of the County's acceptance, petitioners are forced to bear a "'permanent physical occupation'" of their property, subject to the public's unfettered right to use the land "to pass to and fro," *Nollan*, 483 U.S. at 832, and petitioners' right to exclude others has been permanently extinguished. See *Copeland* v. *City of Oakland*, 23 Cal. Rptr. 2d 719, 723 (Cal. Ct. App. 1993) (upon acceptance of an offer to dedicate, "'the property is thereafter held in trust for public use'" and is "'no longer subject to private control'"). The County's acceptance of the

offer to dedicate worked a legally distinct deprivation of property for which petitioners have a takings claim.[5]

To support the proposition that a taking occurs when an offer to dedicate an easement is granted, and not when that offer is exercised, the court of appeals relied upon *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). But this Court in *Lucas* was careful to note that there is no taking when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the landowner's] title to begin with." See *id.* at 1027. In contrast, as demonstrated above, California law is unambiguous that the offer to dedicate at issue in this case was not a preexisting limitation on petitioners' ability to exclude others. Thus, in no sense did the offer to dedicate impose a preexisting limitation on certain of petitioners' fundamental rights with respect to the portion of their land subject to that offer. Rather, this limitation inhered only after the County exercised its own discretion and chose to accept the original offer to dedicate. If anything, *Lucas* demonstrates that this Court has expressly rejected the very proposition endorsed by the Ninth Circuit.[6]

Although the Coastal Commission's decision to impose the unconstitutional condition was a necessary predicate for the County's later decision to accept the offer to dedicate, the two decisions are logically and legally distinct. In accepting the

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[5] This same analysis applies even if the Court accepts the Ninth Circuit's erroneous view that the offer coerced for no consideration from the Bucklews in 1987 was a mere renewal of the unrecorded offers the Commission extorted from Johnson in 1974 and 1977. Whether the County accepted an offer that was made in 1987, or made in 1974 and simply "renewed" thereafter, it was the 1998 act of acceptance that first deprived any property owner of the right to exclude others.

[6] The decision below also relied on *United States* v. *30.54 Acres of Land*, 90 F.3d 790 (3d Cir. 1996) to support the same proposition. Yet *30.54 Acres* merely reiterates and applies the teachings of *Lucas* which, as discussed, do not support the procedural bar created by the Ninth Circuit. *Id.* at 795.

offer to dedicate, the County made its own purely discretionary decision that was not compelled by the original permit condition. See *Grupe*, 212 Cal. Rptr. at 592 (noting that it was unlikely that a public agency would actually accept the offer to dedicate at issue in that case). In making this decision, moreover, the County had an independent duty to respect the constitutional rights of property owners. Its decision to accept an easement that was patently inconsistent with the requirements of *Nollan* and *Dolan*, therefore, is a legally separate governmental act that caused an injury that the original extraction made possible but did not, by itself, cause. See *Whalers' Village Club*, 220 Cal. Rptr. at 14-15.[7]

In short, although the same constitutional flaw infects both the Coastal Commission's action and that of the County, the County's acceptance of the offer to dedicate resulted in a constitutional injury that the Commission's permit decision alone did not cause. This Court should grant review in order to make clear that the dictates of the Takings Clause cannot be circumvented by state efforts to appropriate private property in two steps rather than one.

II. THE PROCEDURAL BAR CREATED BY THE COURT OF APPEALS' DECISION IS IRRECONCILABLE WITH THIS COURT'S RIPENESS DOCTRINE.

The decision below also rests on a fundamental misapprehension of federal ripeness principles. That mistake

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[7] Under the contrary, and misguided, reasoning of the lower court, a local government would today be free to accept an offer to dedicate an easement for a "whites only" beach that a permitting body coerced when de jure racial segregation practices were under legal attack but had not yet been deemed unconstitutional or proscribed by any federal statute. Although the same equal protection violation would inhere in both the permit and the subsequent acceptance decision, it is perfectly clear that a decision to accept such an unlawful offer gives rise to a separate constitutional wrong by a separate state entity bound to respect constitutional rights.

led the lower court to adopt a procedural rule that bars judicial review of a valid takings claim, and thereby impermissibly "relieve[s] [the State] of the duty to provide compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles, Cal.*, 482 U.S. 304, 321 (1987). As it did in *First English*, this Court should grant review to correct this constitutional error and to make clear that the "failure" to bring a plainly unripe claim cannot serve as the basis for precluding judicial review of a scheme that sidesteps the dictates of the Takings Clause.

That a property owner may not pursue a takings challenge until there has been a final government decision is well-established. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985); see also *Palazzolo*, 533 U.S. at 620, 621 (as a general rule a taking is not ripe until "a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation" such that the "extent of the restriction on property is . . . known"). Under California law, it is clear that no state agency made a final decision to divest petitioners of their right to use and exclude others from their beachfront property until the County's 1998 decision to accept the offer to dedicate. Any claim seeking redress for a physical taking would have been entirely premature in 1987; at that time, and for more than a decade thereafter, no one knew whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]").

The court of appeals' conclusion that petitioners' claims were barred by the "failure" of their predecessors-in-interest to file a takings claim for the Commission's coerced offer is flatly inconsistent with these ripeness principles. Under this Court's precedents, it is clear that any challenge to the taking caused by the County's acceptance of the offer to dedicate

was unripe when the offer to dedicate was recorded, and that petitioners' predecessors could not have brought (and thus could not have waived) any challenge to that extraction in 1987. Indeed, the court of appeals' flawed reasoning would allow a recording landowner to obtain an undeserved windfall – she would be entitled to government compensation for the full value of a property loss that might never come to pass if the offer to dedicate expired without acceptance, or, as actually happened here, that might be suffered by another. See *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) ("compensation is due at the time of taking, [and] the owner at that time, not the owner at an earlier or later date, receives the payment").

In ruling otherwise, however, the lower court reasoned that, because the existence of the offer to dedicate was a matter of public record when petitioners purchased the property, it could be presumed that their purchase price was reduced by the full value of the easement and that they had therefore suffered no injury, even though no evidence in the record supported this presumption. Moreover, the decision below reasoned that under the view advanced by petitioners:

> no land-use restriction would ever be safe from a takings challenge. Every new purchaser could bring a takings challenge even if there had been a taking for which the prior owner had already been compensated; if the prior owner had already litigated and lost a takings challenge to that restriction; or if the prior owner had allowed application [sic] limitations periods to lapse without creating a ripe takings claim or challenging an already-ripe claim.

Pet. App. 12a.

The court's reasoning is flawed in two respects. First, it ignores the speculative nature of governmental acceptance of an offer to dedicate, an event contingent on a number of factors, some of which were beyond the control of any

governmental entity. See *Baldwin*, 83 Cal. Rptr. 2d at 187; *Grupe*, 212 Cal. Rptr. at 592, 602; *Whalers' Village Club*, 220 Cal. Rptr. at 14. In light of these holdings, and the fact that, in the 1970s and 1980s, the Commission had not even embarked on its plan vigorously to urge local governments to accept outstanding offers to dedicate easements, it is simply incorrect to presume that petitioners' purchase price reflected the value of the property minus the full value of the easement. Second, petitioners do not challenge a restriction which the prior owners could have previously litigated or for which they could have been compensated. Rather, they seek relief for the taking that occurred in October 1998 as a result of the County's acceptance of the offer to dedicate, a claim that plainly could not have been brought by anyone other than petitioners.

In any event, it is clear that judicial review of valid takings claims cannot be foreclosed based on the considerations endorsed by the court below. In *Palazzolo*, this Court flatly rejected a rule that a successive title holder with notice of an existing limitation has no right to be free from an uncompensated taking. Condemning such a bar as "too blunt an instrument to accord with the duty to compensate for what is taken," this Court held it would be illogical and unfair to allow the state to secure a windfall where, as here, ripeness principles prevented petitioners' predecessors from maintaining the claim petitioners now bring. 533 U.S. at 628.

This Court should continue to reject procedural bars that seek to compel the bringing of takings claims that, under this Court's precedents, are plainly unripe, particularly where, as here, a "failure" to bring such an unripe claim then forms the basis for precluding *any* judicial review of an unquestionably meritorious takings claim. The decision below improperly forecloses the redress, contemplated by 42 U.S.C. § 1983, based on a procedural waiver rule that is irreconcilable with governing ripeness principles.

III. UNLESS THIS COURT GRANTS REVIEW, HUNDREDS OF OTHER UNCONSTITUTIONAL DEPRIVATIONS WILL ESCAPE JUDICIAL REVIEW.

Absent this Court's intervention, the unconstitutional taking of property that occurred in this case will not be isolated: government entities throughout the nine western states in the Ninth Circuit will understand they are free to accept outstanding offers to dedicate without satisfying the commands of the Fifth Amendment. First, hundreds of other offers to dedicate easements that California's Coastal Commission coerced are due to expire soon, and the intention to secure acceptance of as many of these easements as possible is well-documented. See James Rainey, *Faster Action by Agencies Is Preserving Beach Access*, L.A. Times, July 10, 2000, at A3, *available at* 2000 WL 2258956.

Indeed, unless this Court grants review, it is unlikely that other property owners will even attempt to challenge such acceptance decisions. In its zeal to obtain acceptance of hundreds of outstanding offers to dedicate, the Coastal Commission has taken extraordinary steps against those resisting such efforts, threatening them personally with fines amounting to potentially tens of millions of dollars. See, *e.g.*, Petition for a Writ of Certiorari at 19, *Cole* v. *County of Santa Barbara*, No. 01-1173 (U.S. filed June 3, 2002). Should this Court deny review here, few litigants will have either the financial wherewithal or the resolve to withstand such administrative intimidation in the future. This Court condemned the Coastal Commission's strong-arm tactics in *Nollan*; it should not blink at them now when the effect will be precisely the same, *viz.*, uncompensated takings of property.

Second, the decision below provides a clear roadmap that other government entities can use to escape this Court's holdings in *Nollan* and *Dolan*. Rather than employ direct extortion as in *Nollan*, government entities will simply use the

"offer to dedicate" scheme to avoid paying for their takings. Most landowners will have little incentive to mount a takings challenge to a coerced offer to dedicate given that (1) any such challenge would be dismissed on grounds that it is unripe, see *supra* at 14-16, and (2) the remote possibility that such an offer will ever affect the current landowner. Thus, the government can extract such offers with impunity, wait years to implement the actual taking, and resist subsequent compensation claims based on the waiver and statute of limitations principles endorsed by the decision below. The resulting procedural bar prevents the truly injured landowner from challenging the real taking because no one could have, consistent with this Court's ripeness doctrine, acted in response to the relatively trivial action taken earlier. This Court should grant the petition in order to ensure that the procedural bar adopted below does not render the promise of *Nollan* and *Dolan* completely illusory.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.[8]

Respectfully submitted,

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July 17, 2002

[8] Should the Court also grant the petition filed in *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 5, 2002), petitioners respectfully request that the Court grant this petition and consolidate the cases for briefing and argument. Alternatively, petitioners request that this Court, at a minimum, hold this case pending the disposition of *Cole*.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 99-56887

ANN DANIEL; LEONARD HILL,
Plaintiffs-Appellants,

v.

COUNTY OF SANTA BARBARA; All Persons Unknown, Claiming any Right, Title Estate Lien or Interest in or to the w/in Described Property; Does, 1-1000 inclusive,
Defendants-Appellees.

Argued and Submitted June 4, 200
Filed March 12, 2002
Withdrawn April 18, 2002

Appeal from the United States District Court for the Central District of California; Margaret M. Morrow, District Judge, Presiding. D.C. No. CV 98-09453-MMM.

Before TROTT, McKEOWN, and W. FLETCHER, Circuit Judges.

ORDER

The Opinion filed March 12, 2002, and appearing in the advance sheets at 282 F.3d 1196, is hereby withdrawn and replaced by the attached opinion.

With the filing of this new opinion, the panel has voted unanimously to DENY the petition for rehearing filed by Appellees County of Santa Barbara, et al. on March 26, 2002.

The panel has also voted unanimously to DENY the petition for rehearing and the petition for rehearing en banc filed by Appellants Daniel and Hill on March 26, 2002. The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

OPINION

WILLIAM A. FLETCHER, Circuit Judge.

Appellants Ann Daniel and Leonard Hill ("the Daniels") purchased beachfront property in Santa Barbara County ("the County") in 1997. In 1974, Carl Johnson, one of the Daniels' predecessors in interest, made a 25-year "firm, continuing" Offer to Dedicate to the County a five-foot-wide pedestrian and bicycle easement across the property. In 1977, Johnson renewed the offer. These two Offers to Dedicate were exacted by the County in return for granting permits to Johnson to divide and then to build on the property. In 1987, W. Bruce and Darleine Bucklew ("the Bucklews"), also predecessors in interest, made a 25-year "irrevocable" Offer to Dedicate the same five-foot easement. All three Offers to Dedicate were matters of public record.

In 1998, shortly after the Daniels' purchase of the property (and within the 25-year periods of all three Offers to Dedicate), the County accepted the Offer to Dedicate made by the Bucklews. The Daniels challenged the County's action in federal district court under 42 U.S.C. § 1983, alleging a violation of the Takings Clause of the federal Constitution. They also alleged violations of state law. The County successfully moved to dismiss the complaint, and the Daniels appeal the dismissal of their § 1983 claim. We affirm the district court.

I

In 1997, the Daniels purchased beachfront property in Santa Barbara County that had once been part of a larger parcel owned by Johnson. In 1973 and 1974, Johnson had divided the original parcel into four separate parcels; the division included a thirty-foot-wide driveway and a five-foot-wide passageway to the beach for the common use of the owners of the four parcels. A regional commission of the California Coastal Zone Conservation Commission ("Coastal Commission" or "Commission")[1] approved the division, conditioned on Johnson's

> offer[ing] for dedication to the County of Santa Barbara or its successor in jurisdiction, for recreational pedestrian and bicycle access an easement 5' in width from Padaro Lane to the mean high tide line . . . . Said offer shall be a *firm continuing offer of dedication* which is not rejected or vitiated by failure to accept or purported rejection for a period of 25 years, unless the County has in the meantime provided beach access within a distance of 300 yards upcoast or downcoast of this parcel. The offer of dedication shall be conditioned on assumption by the County of Santa Barbara or its successor, of the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement.

(Emphasis added.) Johnson appealed the imposition of this Firm Continuing Offer to Dedicate ("FCOTD") to the Commission, which affirmed the regional commission's decision. Johnson brought no judicial challenge to the administrative decision.

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[1] The California Coastal Zone Conservation Commission was created in 1972. Cal. Pub. Res. § 27200 (repealed 1977). In 1977, it became the California Coastal Commission. Cal. Pub. Res. §§ 30105, 30300. For convenience, we refer to the two commissions interchangeably as the "Coastal Commission."

In 1977, Johnson applied to the Coastal Commission for a permit to build a house on the parcel that is now owned by the Daniels. The permit was approved by the Commission, conditioned on a renewal of the 25-year FCOTD described above. Johnson built the house under the permit in 1978, and he did not challenge the imposition of the renewed FCOTD either administratively or judicially.

The Bucklews owned the parcel on which Johnson built the house as successors in interest. In August 1987, in response to a demand by the Commission, the Bucklews signed a 25-year Irrevocable Offer to Dedicate ("IOTD") the same five-foot easement described in the two FCOTDs granted by Johnson. The Bucklews did not challenge the Commission's demand for the IOTD either administratively or judicially.

The Daniels purchased the Johnson/Bucklew property in 1997. On September 15, 1998, the County notified them that on October 6, 1998, it would consider whether to accept the Bucklews' 1987 IOTD. On October 5, 1998, the Daniels unsuccessfully attempted to rescind it. On October 20, 1998, the County Board of Supervisors adopted a resolution accepting the 1987 IOTD.

In November 1998, the Daniels filed suit against the County for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging a physical taking in violation of the Takings Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. They also alleged several violations of state law. On motion by the County, the district court dismissed the takings claim. It held that the Daniels lacked standing because all the Offers to Dedicate were attached to the property at the time they purchased it. Alternatively, the district court held that any takings claims accrued in 1974 and 1977, and in any event no later than 1987, and were therefore time-barred. Finally, the district court held that even if the Daniels had standing and their takings claim was not time-barred, the claim would not be ripe because the Daniels could

not allege that the state had refused to compensate them or their predecessors for the alleged taking. The district court then dismissed the supplemental state claims without prejudice pursuant to 28 U.S.C. § 1367(c). The Daniels appeal the dismissal of their takings claim.

II

We review questions of law *de novo*. *See McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 741 (9th Cir.1999). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief." *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir.2000). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir.2000). Dismissals for failure to state a claim or for lack of standing are reviewed *de novo*. *See Williamson*, 208 F.3d at 1149; *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir.2000). Dismissal on statute of limitations grounds is reviewed *de novo*. *See Ellis v. City of San Diego*, 176 F.3d 1183, 1188 (9th Cir.1999). Ripeness is a question of law reviewed *de novo*. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir.1998).

Under the Takings Clause of the Fifth Amendment, the government may not take "property . . . for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is applied to the states through the Fourteenth Amendment. The clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

We affirm the district court's dismissal of the Daniels' takings claim on two independently sufficient grounds. First, the Daniels' claim is an impermissible attempt to revive the

time-barred claims of their predecessors in interest. Second, the injunctive and declaratory remedy sought by the Daniels is, in any event, not available under the takings claim they seek to bring.

III

We first examine the takings claims of the Daniels' predecessors in interest, Johnson and the Bucklews. Johnson's and the Bucklews' claims arising out the exaction of the offers to dedicate can plausibly be characterized as either regulatory or physical takings. Under either characterization, Johnson and the Bucklews are time-barred from pursuing those claims. The Daniels, as their successors in interest, are similarly time-barred. They may not bring a claim based on the exaction of the offers to dedicate, or on the later acceptance of one of those offers.

A

We think it most plausible to characterize Johnson's and the Bucklews' claims as alleged regulatory rather than physical takings. The Coastal Commission regulated the development of private property along the California coast, including the Johnson/Bucklew property. As part of that regulation, it granted permission to subdivide the parcel and to build on one of the four lots in return for Johnson's agreement to grant the two FCOTDs. The Commission did not grant anything in exchange for the Bucklews' grant of the IOTD, but the Bucklews' grant was part of the ongoing regulatory process that had begun with Johnson's grant of the first FCOTD in 1974.

Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), a challenge to an alleged regulatory taking is not ripe unless two conditions are satisfied. First, the action alleged to constitute the taking must be "a final decision regarding how [the owner] will be allowed to develop its property." *Id.* at 190, 105 S.Ct. 3108. An action is not final

"until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186, 105 S.Ct. 3108. As the Court explained last Term in *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."

Second, a plaintiff must have sought compensation for the alleged taking through available state procedures. A state is not forbidden to take private property for public use. It is only forbidden to do so if it does not pay just compensation for that property. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195, 105 S.Ct. 3108. *See, e.g., Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir.1993); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir.1991).

The first *Williamson County* requirement was satisfied in this case. Johnson objected to the exaction of the 1974 FCOTD and then appealed unsuccessfully to the Coastal Commission. Once the Commission affirmed that FCOTD, the conditions on which Johnson would be permitted to subdivide his parcel were "known to a reasonable degree of certainty," *Palazzolo*, 533 U.S. at 620, 121 S.Ct. 2448, and the Commission's action was final. Given the affirmance by the Commission of the exaction of the 1974 FCOTD, we do not believe that appeals from the 1977 FCOTD and the 1987 IOTD were necessary in order to obtain final decisions, for even without administrative appeals, it was "known to a reasonable degree of certainty" what the ultimate answer would be.

However, the second *Williamson County* requirement does not appear to have been satisfied. Neither Johnson nor the Bucklews ever attempted to use state procedures to obtain just compensation from the Commission, which exacted the offers to dedicate, or from the County of Santa Barbara, to which the offers were made. Assuming that adequate state procedures were available to seek such compensation, the failure of Johnson and the Bucklews to seek just compensation meant that they never created ripe federal takings claims. The failure of Johnson and the Bucklews to use such state procedures cannot now be cured because the applicable state limitation periods have long since expired.

An alternative analysis is possible for Johnson. There may have been no adequate state procedures available to him for the 1974 and 1977 FCOTDs because, as a general rule, California did not allow inverse condemnation suits for regulatory takings until 1987, when the Supreme Court decided *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). *See San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir.1998); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir.1993). If the exactions of the 1974 and 1977 FCOTDs were regulatory takings for which California had no available state procedures, Johnson's takings claims for those exactions were ripe as soon as the Commission's decisions were final. *See Williamson County*, 473 U.S. at 194-97, 105 S.Ct. 3108. If that is so, however, the statute of limitations for claims based on those exactions began to run in the 1970s and has long since expired.

B

It is also plausible to characterize Johnson's and the Bucklews' claims as alleged physical takings. Although the exactions of the FCOTDs and the IOTD resulted from the Coastal Commission's regulatory process, the ultimate result of the process was the exaction of options for a public access

easement across private property. The Supreme Court has made clear that such an easement is a "permanent physical occupation." *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of [the takings] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

The ripeness analysis of *Williamson County* applies to physical takings, but in a modified form. The first *Williamson County* requirement is automatically satisfied at the time of the physical taking. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n. 28 (9th Cir.1986) ("Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact."), *overruled on other grounds by Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). If the exactions of the FCOTDs and IOTD were physical takings, the finality requirement was automatically satisfied at the time of the exactions. The second *Williamson County* requirement remains the same. In a physical takings case, as in a regulatory takings case, the property owner must have sought compensation for the alleged taking through available state procedures. *See Williamson County*, 473 U.S. at 194-95, 105 S.Ct. 3108; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir.1989) ("Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available."), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir.1996) (en banc). Neither Johnson nor the Bucklews ever sought compensation pursuant to state procedures for any alleged taking arising out of the FCOTDs and IOTD. It is now too late for them to do so, for the applicable limitations periods have long since expired.

C

The Daniels purchased their property with notice of the FCOTDs and IOTD. They cannot, by virtue of their purchase, obtain greater rights than those held by their predecessors in interest. They therefore cannot bring the time-barred state administrative and judicial challenges, or the § 1983 takings challenge, that Johnson and the Bucklews failed to bring. Indeed, the Daniels purport not to revive the takings claims of their predecessors in interest. Rather, they purport to bring a takings claim on their own behalf, which they contend arises out of the County's 1998 acceptance of the 1987 IOTD. They contend that the County's acceptance of the IOTD—in effect, the County's exercise of its option—is an action that, if uncompensated, constitutes a taking.

Under established federal law, a taking occurs when an option to take an easement is granted, not when the option is exercised. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." (emphasis in original) (internal citation omitted)); *United States v. 30.54 Acres of Land*, 90 F.3d 790, 792 (3d Cir.1996) ("Because the navigational servitude was a preexisting limitation on the landowners' title to riparian land, we hold the Corps' exercise of the servitude . . . was not a taking [.]"). Under established California law, an option to purchase land is a cognizable property interest in an eminent domain proceeding. The value of the option is "the excess—if any—of the total [eminent domain] award above the 6174 optioned purchase price." *County of San Diego v. Miller*, 13 Cal.3d 684, 693, 119 Cal.Rptr. 491, 532 P.2d 139 (1975).

Under these established principles, the taking of the FCOTDs and the IPOTD—that is, the taking of options to accept the easement—took place in 1974, 1977, and 1987. The value of these options was the value of the easement, minus the "optioned purchase price" the County would have to pay. Because the County did not have to pay anything to exercise the options, the value of what was taken from Johnson and the Bucklews was the full value of the easement. Thus, when the Daniels purchased the property from the Bucklews, the offers to dedicate the easement had already been taken from their predecessors in interest, and the County's acceptance of one of those offers took nothing from the Daniels that had not already been taken.

The existence of the FCOTDs and IOTD was a matter of public record when the Daniels purchased the property, and we may presume that their purchase price reflected that fact. As we stated in *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir.1994), *overruled on other grounds by WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997) (en banc), "A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken." The Court's decision last Term in *Palazzolo* indicates that in some circumstances a purchaser may have a valid takings claim even if his or her purchase price was discounted to reflect existing land-use regulations, but we believe that the reasoning of *Palazzolo* does not apply to this case.

In *Palazzolo*, the landowner took ownership of property that was already subject to existing state regulations restricting the use of wetlands. The landowner later sought approval for a specific use of the property, which the state refused, pursuant to the regulations. The state court held that there was no taking because the landowner's investment-

backed expectations included the reduction in the fair market value that resulted from the regulations that were in existence when the property was acquired. The Supreme Court condemned the state court's "single, sweeping rule" under which a "purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. at 626, 121 S.Ct. 2448. "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628, 121 S.Ct. 2448.

Palazzolo rejected the state court's "blanket rule" that would have found no taking whenever a purchaser was aware of existing land-use regulations that reduced the market value of property. But *Palazzolo* did not adopt the converse of that rule. That is, it did not adopt a rule that would find a taking whenever there are pre-existing restrictions on land use that reduce market value. If that were the rule, no land-use restriction would ever be safe from a takings challenge. Every new purchaser could bring a takings challenge even if there had been a taking for which the prior owner had already been compensated; if the prior owner had already litigated and lost a takings challenge to that restriction; or if the prior owner had allowed application limitations periods to lapse without creating a ripe takings claim or challenging an already-ripe claim.

The facts of *Palazzolo* were substantially different from those in this case, and the Supreme Court's rejection of the state court's "blanket rule" in that case does not require that we find that the Daniels have a viable takings claim. In *Palazzolo*, the taking, if there was one, was regulatory rather than physical taking. The landowner took ownership of the property subject to pre-existing wetlands regulations that had the potential, in the context of a specific proposed project,

later to effect a regulatory taking. No taking occurred until the specific proposal was rejected, after ownership of the property changed hands. In this case, the Daniels allege a physical taking. They purchased their property subject to the County's pre-existing options to accept dedication of an easement. When the County exercised one of the options to accept the easement, it effected a physical taking, but only to the extent that it took something of value. Because the full value of the easement had already been taken from the Daniels' predecessors, it took nothing of value from the Daniels.

IV

The Daniels do not seek damages, in the form of just compensation, for the physical taking they allege. If the Daniels sought damages, their claim would not be ripe, for they have not used available state procedures to seek just compensation. *See Williamson County*, 473 U.S. at 194-95, 105 S.Ct. 3108; *Sinaloa*, 882 F.2d at 1402. Instead of damages, the Daniels seek declaratory and injunctive relief against the County's acceptance of the 1987 IOTD. The argue that they need not seek damages because the County cannot constitutionally accept the IOTD, even if it is willing to pay whatever just compensation might be owed. Because they do not seek damages, they argue that they need not seek just compensation through available state procedures.

Damages, in the form of just compensation, are the normal remedy for a takings claim. In almost all takings cases, the governmental body has the constitutional power to regulate or seize the private property in question; the only issue is whether (or how much) it needs to pay for that property. Indeed, it is the very essence of an ordinary takings claim that the property owner cannot prevent the governmental body from regulating or seizing the property, provided that just compensation is paid.

The Supreme Court has recognized an exception to the usual requirement that a property owner must seek compensation through state procedures. In *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), the Court stated that where a municipal ordinance is facially challenged on the ground that the ordinance "does not "'substantially advance'" a "'legitimate state interest'" no matter how it is applied," there is no requirement that the property owner first seek just compensation. 503 U.S. at 534, 112 S.Ct. 1522. In such a case, the property owner's argument is that the municipality has no authority to adopt the ordinance, and that payment of compensation by the municipality cannot confer an authority that is otherwise lacking. *See Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir.1996) (discussing *Yee* in dictum); *Carson Harbor*, 37 F.3d at 476-77 (same). *See also Tolksdorf v. Griffith*, 464 Mich. 1, 626 N.W.2d 163 (2001) (governmental taking of property for a private road invalid because not for a "public purpose").

The Daniels' failure to seek compensation though available state procedures cannot be excused under the rationale of *Yee*. There is no doubt that a governmental body may compel a property owner to convey a public access easement. If there is a constitutional infirmity in the County's acceptance of the offer to dedicate the public access easement across the Daniels' property, it does not lie in the inability of the Coastal Commission to compel the offer, or the inability of the County to accept it. The constitutional infirmity lies, rather, in the Coastal Commission's and the County's failure to pay. As the Court put it in *Nollan v. Cal. Coastal Commission*, 483 U.S. 825, 841-42, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), "California is free to . . . [use] its power of eminent domain for the 'public purpose,'. . . but if it wants an easement across the Nollans' property, it must pay for it."

Because the Coastal Commission and the County have the constitutional authority to take the easement, the only possible remedy for the Daniels' alleged physical taking is damages. However, the Daniels have failed to seek just compensation through available state procedures, and have not sought damages in this suit. They have instead sought injunctive and declaratory relief that would prevent the County from accepting the easement, even upon payment of just compensation. Because the Commission and the County have the authority to compel the conveyance of a public access easement upon payment of just compensation, the Daniels are not entitled to such relief.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed: October 13, 1999]

Case No. CV 98-9453 MMM (AJWx)

ANN DANIEL and LEONARD HILL,
Plaintiffs/Petitioners,

vs.

COUNTY OF SANTA BARBARA, et al.,
Defendants/Respondents.

ORDER GRANTING DEFENDANT
COUNTY OF SANTA BARBARA'S
MOTION TO DISMISS

In 1997, plaintiffs Ann Daniel and Leonard Hill purchased a beachfront home an Padaro Lane in Santa Barbara County (the "Property"). The Property had once been part of a larger parcel belonging to Carl Johnson, which Johnson subdivided into four lots in 1974. The California Coastal Commission approved Johnson's subdivision map on the condition that he make an offer, irrevocable for 25 years, to dedicate a public access easement, consisting of a 5 foot wide walkway, across his property from Padaro Lane to the mean-high tide mark. In 1977, Johnson obtained a permit to build a residence on what was later to become plaintiffs' property. The permit contained the same condition.

On April 7, 1987, in response to a demand by the California Coastal Commission, the Property's subsequent owners, Bruce and Darleine Bucklew, signed an "Irrevocable Offer to Dedicate" the 5 foot public access walkway. This offer was recorded on April 9, 1987 in the Official Records of Santa Barbara County. Neither Carl Johnson nor the Bucklews are parties to this suit.

Plaintiffs Ann Daniel and Leonard Hill purchased the Property in 1997. On September 15, 1998, Santa Barbara County gave them notice that, on October 6, 1998, it would consider whether to accept the 1987 Offer. On October 5, 1998, plaintiffs attempted to rescind the 1987 Offer. They filed written objections and reiterated their protests at the public hearing. Nonetheless, on October 20, 1998, the Board of Supervisors adopted a resolution accepting the Bucklews' 1987 Offer as well as many similar offers to dedicate public access easements.

Plaintiffs filed this declaratory relief suit against the County on November 24, 1998, alleging a physical taking in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. Additionally, they alleged a taking in violation of Article I, § 19 of the California Constitution and other pendent state claims for quiet title and violation of the California Environmental Quality Act (CEQA).

The County has moved to dismiss, contending that (1) plaintiffs' takings challenge is not ripe for decision because their predecessors-in-interest failed timely to exhaust their state remedies and never sought just compensation; (2) the California Coastal Commission is an indispensable party that cannot be joined because it enjoys Eleventh Amendment immunity from suit in federal court; (3) plaintiffs and their predecessors-in-interest waived their right to challenge the conditions by enjoying the benefits of the permits that were issued; (4) plaintiffs' takings claim is time-barred because the

statute of limitations on it began to run when the Commission imposed conditions on the issuance of the subdivision map and building permits in 1974 and 1977, respectively; (5) plaintiffs lack standing to sue for conditions that were proposed by the Commission and accepted by their predecessors-in-interest because plaintiffs purchased the property subject to the conditions; and (6) a stay of the action in favor of state court remedies is appropriate under the *Pullman* abstention doctrine.

The court's threshold inquiry must be whether plaintiffs have a viable federal constitutional claim, since that is the basis upon which jurisdiction is invoked. Plaintiffs' Fifth Amendment takings challenge is based on the alleged unconstitutional conditions the Commission attached to its issuance of permits to Johnson in 1974 and 1977, and its demand that those conditions be reaffirmed by the Bucklews in 1987. Neither Johnson nor the Bucklews challenged the conditions, and they attached to the Property prior to the time plaintiffs took title to it. For this reason, plaintiffs lack standing to pursue a takings claim. Moreover, any takings claim is time-barred because it accrued in 1974 and 1977, when the conditions were imposed, and no later than 1987, when the were reaffirmed by the Bucklews in response to a demand by the Commission.

Finally, even if plaintiffs had standing to raise a takings claim, and even if such a claim were not time-barred, it would not be ripe for decision because plaintiffs have not (and cannot) allege an essential element of the claim—that the state refused to compensate them or the prior owners for the purported taking. Accordingly, the court finds that plaintiffs' federal claims are non-justiciable and must be dismissed. Consequently, it need not address the County's arguments regarding abstenation, waiver and the absence of an indispensable party from the suit. Additionally, the court

concludes that it is appropriate at this early stage of the litigation to dismiss plaintiffs' pendent state claims.

I. FACTUAL BACKGROUND

In deciding a motion to dismiss under Rule 12(b)(6), the court's review is limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). All allegations of material fact must be taken as true, and construed in the light most favorable to the non-moving party. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). For this reason, the statement of facts that follows recites and accepts as true the allegations contained in plaintiffs' complaint. Additionally, because one of the bases for this motion is an asserted lack of subject matter jurisdiction, the court is authorized under Rule 12(b)(1) to consider facts beyond the face of the complaint and has done so in this instance.

A. Carl Johnson

In 1973, Carl D. Johnson owned the Property as part of a larger parcel. Johnson applied to Santa Barbara County for approval to divide the parcel into four separate lots. As proposed, the division included a private 30-foot driveway and a private 5-foot walkway to the beach for the owners of the four parcels to use.[1] On December 6, 1973, the County approved "Parcel Map No. 11,909" (the "Parcel Map"), dividing the land into four parcels designated Parcels "A" through "D." Parcel "A" later became plaintiffs' Property.[2]

In early 1974, Johnson submitted an application to the California Coastal Commission (Application No. 26-25) for approval of the Parcel Map. On April 11, 1974, the South

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[1] Complaint, ¶ 7.

[2] *Id.*, ¶ 8.

Central Coast Regional Commission conditionally approved the map. One of the two conditions read as follows:

> "Applicant shall offer for dedication to the County of Santa Barbara or its successor in jurisdiction, for recreational pedestrian and bicycle access an easement 5' in width from Padaro Lane to the mean high tide line coinciding with the 30' ingress and egress right-of-way delineated on the lot split map accompanying the Application. Said offer shall be a firm continuing offer of dedication which is not rejected or vitiated by failure to accept or purported rejection for a period of 25 years, unless the County has in the meantime provided beach access within a distance of 300 yards upcoast or downcoast of this parcel. The offer of dedication shall be conditioned on assumption by the County of Santa Barbara or its successor, of the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement.[3]

Johnson appealed the foregoing Permit Condition to the California State Coastal Zone Conservation Commission.[4] On May 15, 1974, that Commission found that the appeal raised "no substantial issue[s]" and confirmed the decision of the Regional Commission.[5] Johnson did not appeal the decision further or seek any judicial remedy. On September 12, 1974, Parcel Map No. 11,909 was recorded in Santa Barbara County's official records, thereby completing the division of the land into four parcels.[6]

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[3] *Id.*, ¶ 9.

[4] *Id.*, ¶ 10.

[5] *Id.*, ¶ 11

[6] *Id.*, ¶ 12 Plaintiffs allege that neither the County nor the California Coastal Commission required the execution and recordation of a separate document embodying the offer to dedicate at any time prior to recordation

In 1977, Johnson submitted an application for a Coastal Development Permit to the California Coastal Commission in order to build a residence for his family on the Property.[7] On September 16, 1977, the Commission approved issuance of Coastal Development Permit No. 141-19 (the "CDP"), which included a "Special Condition" identical to the condition imposed on the Parcel Map quoted above.[8] Johnson constructed a residence on the Property in 1978 as authorized by the CDP.[9]

Plaintiffs allege that neither at the time the permit conditions were imposed, nor at any time thereafter, did issuing authorities make an individualized determination that the activity authorized by the permits (i.e., subdividing the parcel into four lots and building a residence) would adversely impact the public's ability to access the publicly-owned, adjacent beach.[10] Rather, they contend there has never been a rational relationship between the conditions imposed and the Property's development and use.[11] Plaintiffs also assert that at the time the permit conditions were imposed, the County made no offer of monetary compensation in exchange for the concessions.[12]

B. The Bucklews

On April 8, 1987, Bruce and Darleine Bucklew, who were then the owners of the Property, executed an "Irrevocable Offer to Dedicate," which was dated April 7, 1987 and was

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of the Parcel Map. Thus, they assert the act of recordation constituted the offer satisfying the permit condition. *Id.*

[7] *Id.*, ¶ 13.

[8] *Id.*, ¶ 14.

[9] *Id.*, ¶ 15.

[10] *Id.*, ¶¶ 16, 19, 20.

[11] *Id.*, ¶¶ 17, 18.

[12] *Id.*, ¶ 21.

recorded on April 9 in the Official Records of Santa Barbara County as Instrument No. 1987-025967 ("the 1987 Offer"). The 1987 Offer makes specific reference to the CDP.[13] Plaintiffs allege that California Coastal Commission officials threatened and intimidated the Bucklews into signing the 1987 Offer, and that they signed it only under duress. Prior to the execution of the 1987 Offer, Commission officials sent the Bucklews a letter that stated:

> "If this permit condition [requiring that an offer to dedicate be signed] still has not been met, please be advised that you are in violation of the Coastal Act of 1976. Those found in violation of the Coastal Act are subject to court action for an injunction and/or a fine of $10,000, plus an additional fine of not less than $50 nor more than $5000 for each day a violation continues (Public Resources Code. Sections 30820-23)."[14]

Plaintiffs assert that the Bucklews received no consideration for their execution of the 1987 Offer since the Commission had no legal basis for threatening to bring an enforcement action against them. They further assert that the 1987 Offer was prepared by Commission employees who knew or should have known that the document did not conform to the permit conditions in several respects, including the fact that it purported to extend the life of the Offer 13 years beyond the original expiration date.[15]

Plaintiffs allege that at no time prior to the execution and recordation of the 1987 Offer did any official or employee of the Commission or the County explain to the Bucklews (a) that the 1987 Offer was substantively different from the

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[13] A copy of the 1987 Offer is attached to plaintiffs' complaint as Exhibit "B."

[14] Compliant, ¶ 23.

[15] *Id.*, ¶ 25.

permits conditions; or (b) that the 1987 Offer purported to grant rights substantially beyond those mandated by the conditions.[16]

On June 26, 1987, ten weeks after the execution and recordation of the 1987 Offer, the United States Supreme Court issued its ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). *Nollan* held that a public access condition the California Coastal Commission had placed upon issuance of a building permit for a single family residence was a Fifth Amendment taking that required just compensation.[17] Plaintiffs allege that prior to June 26, 1987, officials and employees of the Commission knew that (a) *Nollan* was pending before the United States Supreme Court; (b) the case involved a challenge to the public access program administered by the Commission; (c) the Supreme Court had granted review after the California Court of Appeal issued a ruling favorable to the Commission, suggesting that the prior ruling was invalid; (d) the Supreme Court had heard oral argument in *Nollan* on March 30, 1987, and was expected to issue its opinion shortly; and (e) the public access program might have to be terminated or substantially restricted depending on the Court's decision in *Nollan*.[18] Plaintiffs allege the Commission withheld the foregoing information regarding *Nollan* from the Bucklews prior to their recordation of the 1987 Offer,[19] that Commission officials had superior knowledge and experience as compared with the Bucklews and that the Commission owed the Bucklews a duty of full disclosure and fair dealing consistent with elemental notions of procedural due process.[20]

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[16] *Id.*, ¶ 26.

[17] *Id.*, ¶ 27.

[18] *Id.*, ¶ 28.

[19] *Id.*, ¶ 29.

[20] *Id.*, ¶ 30.

Plaintiffs allege that prior to the Bucklews' execution of the "Irrevocable Offer to Dedicate" on April 8, 1987, neither the Commission nor the County made an individualized determination that the earlier development of the Property that was the purported justification for the 1987 Offer would adversely impact the public's ability to access the publicly-owned, adjacent beach.[21] Nor, allegedly, did either ever make an individualized determination that the conditions contained in the 1987 Offer were roughly proportional to the impact generated by development of the Property. Rather, plaintiffs contend, there has never been a rational relationship between the conditions in the offer and the Property's development and use.[22] Plaintiffs also assert that neither the Commission nor the County offered the Bucklews any monetary compensation for the exaction.[23]

C. Plaintiffs Ann Daniel And Leonard Hill

Plaintiffs Ann Daniel and Leonard Hill purchased the Property in 1997. On or about September 15, 1998, the County notified them that it intended to consider whether to accept the 1987 Offer at a meeting on October 6, 1998.[24] On October 5, 1998, plaintiffs served a notice of rescission of the 1987 Offer on the County. They also objected in writing and at the public hearing to the imposition of the conditions and extraction of the offer.[25] On October 20, 1998, following a public hearing, the Board of Supervisors adopted Resolution No. 98-389 titled "Resolution of Acceptance of Offers and Irrevocable Offers to Dedicate Public Access Easements."[26]

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[21] *Id.*, ¶ 31.

[22] *Id.*, ¶¶ 32, 35.

[23] *Id.*, ¶¶ 35, 36.

[24] *Id.*, ¶ 37.

[25] *Id.*, ¶39-41.

[26] *Id.*, 42. A copy of the resolution is attached to plaintiffs' complaint as Exhibit "C."

Plaintiffs allege that adoption of the resolution was a discretionary act and that the Board was so informed by County Counsel.[27]

Plaintiffs contend that as of October 20, 1998, the County had not made an individualized determination that development of the Property would have an adverse impact on the public's ability to access the publicly-owned, adjacent beach,[28] or that the extent of the exaction was roughly proportional to the impact of the Property's development.[29] Additionally, they assert that as of that date, there was no rational relationship between the exaction achieved by the Resolution and any impact caused by the development, nor any findings that activity on the Property justified adoption of the Resolution.[30] As of October 20, 1998, the County had not offered Daniel and Hill any monetary compensation for the exaction effected by the Resolution.[31] Further, the County has allegedly not complied with the permit's requirement that it assume "the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement."[32]

II. DISCUSSION

A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(1)

A party asserting that the court lacks subject matter jurisdiction of an action may raise the issue by filing a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil

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[27] *Id.*, ¶ 43.

[28] *Id.*, ¶ 44.

[29] *Id.*, ¶ 48.

[30] *Id.*, ¶ 45-47.

[31] *Id.*, ¶ 49.

[32] *Id.*, ¶ 38.

Procedure. Even where defendant is the moving party, plaintiff bears the burden of establishing that the court has subject matter jurisdiction. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

A Rule 12(b)(1) challenge may be facial (i.e., based solely on the allegations contained in the complaint) or factual (i.e., based on extrinsic evidence presented for the court's consideration). See *Thornhill Publishing Co. v. General Tel. & Electronics*, 594 F.2d 730, 733 (9th Cir. 1979 (facial attack); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (challenge based on extrinsic evidence). Where facial, the court must accept the allegations of the complaint as true. See *Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D.Cal. 1993), aff'd., 56 F.3d 1177 (9th Cir. 1995). Where factual, the court may weigh the evidence presented in order to determine the facts and evaluate whether it has power to hear the case. See *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

The County has attacked the court's jurisdiction to hear plaintiffs' constitutional claim on multiple bases: (1) that it is not ripe for review because plaintiffs and their predecessors-in-interest failed to pursue state court remedies, including attempted recovery of "just compensation" for the alleged Fifth Amendment taking; and (2) that plaintiffs purchased the Property subject to the recorded 1987 Offer, and thus lack standing to challenge the validity of the procedures by which it was obtained. These issues are properly raised by a Rule 12(b)(1) motion. See, e.g., *Bland v. Fessler*, 88 F.3d 729, 732, n. 4 (9th Cir. 1996) (ripeness properly challenged under Rule 12(b)(1)); *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (affirming district court's dismissal for lack of standing under Rule 12(b)(1)); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir 1989) (motions raising ripeness are treated as having been brought under Rule 12(b)(1)); *Coye v. Sullivan*,

1991 WL 319038, * 1 (E.D.Cal. 1991) (because standing implicates subject matter jurisdiction, it is properly challenged under Rule 12(b)(1)).

The County has proffered state records documenting its actions respecting the Property, and the court has accepted and considered this evidence in evaluating defendant's ripeness and standing arguments.

B. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(6)

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (quoting *Conley*), cert. denied, 496 U.S. 906 (1990). In other words, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

As noted above, in deciding a motion to dismiss for failure to state a claim, the court's review is limited to the contents of the complaint. *Campanelli, supra*, 100 F.3d at 1479; *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 84 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995), citing *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *NL Indus. Inc. v.*

Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). It need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981), cert. denied, 454 U.S. 1031 (1981).

The court may not consider material outside the complaint (e.g., facts presented in briefs, affidavits, or discovery materials) in ruling on a Rule 12(b)(6) motion. *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524, 1537 (9th Cir. 1996). Nonetheless, it may properly consider exhibits submitted with the complaint, documents whose contents are alleged in the complaint when their authenticity is not questioned, and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), cert. denied, 114 S. Ct. 2704 (1994).

Because statutes of limitations are not generally regarded as jurisdictional, challenges asserting that a complaint is time-barred are properly considered under Rule 12(b)(6). See *Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24 (9th Cir. 1996) ("Provisions phrased as time limits on filing court actions are generally interpreted as statutes of limitations, not as jurisdictional bars"). Cf. *Lord v. Babbitt*, 943 F.Supp. 1203, 1209 and n. 4 (D.Alaska 1996) (addressing a challenge to plaintiff's complaint based on the statute of limitations under Rule 12(b)(6) rather than Rule 12(b)(1) because federal statutes of limitations are no longer jurisdictional). Here, defendant contends that plaintiffs' claims are time-barred because the statute of limitations began to run in 1974 or 1977, when the conditions were first imposed or, at the latest, in 1987, when the Bucklews signed the irrevocable offer.

C. Fifth Amendment Takings Claim

The Takings Clause of the Fifth Amendment provides: "[N]or shall property be taken for public use, without just compensation." The Fourteenth Amendment's Due Process Clause makes the clause applicable to the States. See *Dolan v. City of Tigard*, 512 U.S. 374, 384, n. 5 (1944). Takings claims generally may be "divided into two classes: permanent physical occupation claims and regulatory takings." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993), cert. denied, 510 U.S. 1093 (1994). "A physical occupation occurs when the government physically intrudes upon private property either directly or by authorizing others to do so. A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical occupation of the property." *Id.*

Plaintiffs seek declaratory relief to remedy a "physical taking of private property." They allege that unless the Resolution of Acceptance is invalidated, it will effect a physical taking of their Property, for which they "have received no compensation" and for which "the County is offering no such compensation.[33] Plaintiffs claim that (1) the initial permit conditions were void; (2) the 1987 Offer was void when made; (3) if the 1987 Offer was ever valid, it became void by virtue of the Supreme Court's decision in *Nollan*; and (4) even if the permit conditions and the 1987 Offer are valid, the Board of Supervisors' Resolution of Acceptance "in and of itself, accomplished a taking of property without compensation."[34]

The County vigorously disputes plaintiffs' assertion that a physical taking has occurred. The issue is key, since characterization of the claim as a physical or a regulatory

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[33] First Amended Complaint, ¶ 54.

[34] *Id.*, ¶ 55(d).

taking will affect when the claim accrued for statute of limitations purposes, whether it is ripe for relief, and whether plaintiffs have standing to sue. Plaintiffs contend there was a physical taking when the County accepted the 1987 Offer and took title to the easement. Additionally, they assert that a physical occupation will inevitably occur when the public is permitted to use the walkway. The County claims that plaintiffs' "characterization of this lawsuit as one for a physical taking rather than a regulatory taking is a transparent attempt to avoid procedural defects which bar a regulatory taking claim in this instance—the statute of limitations and the doctrines of ripeness and res judicata."[35] It contends that plaintiffs' claim is instead based on a "regulatory taking," since the irrevocable offer to dedicate a public access easement was obtained pursuant to a regulatory scheme by which the Commission granted subdivision and building permits conditioned on the execution of such offers.[36]

To a certain extent each party's characterization is correct, since the factual scenario does not fit neatly into either of the two categories, and embodies characteristics of both. Plaintiffs claim that, through a regulatory scheme, the government imposed unconstitutional conditions on the issuance of a public benefit, i.e. a development permit.

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[35] Def.'s Mot., at 1:9-13.

[36] Characterized as a regulatory taking, the County asserts that plaintiffs' claim is actually a facial challenge to the Coastal Act or to the Commission's permitting program. Regulatory takings may be attacked by challenging the facial constitutionality of a statute or land use regulation, or by arguing that the statute is unconstitutional as applied to the plaintiff. "A facial challenge involves 'a claim that the mere enactment of a statute constitutes a taking,' while an as-applied challenge involves 'a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation.'" *Levald, supra*, 998 F.2d at 686 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987)), cert. denied, 510 U.S. 1093 (1994)).

Because the conditions imposed required that the landowners make an irrevocable offer to dedicate an easement over the land, however, the taking effected was physical in nature. The real question is whether the alleged taking occurred at the time irrevocable offer to dedicate was extracted (i.e., 1974 and 1977 or 1987), or only when the County accepted the offer in 1998.

1. When A Taking Occurs

Courts have generally found that a permanent invasion of private property constitutes a *per se* taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (cable television operators installation of cabling on landlords' apartment buildings pursuant to New York law constituted a taking under "the traditional rule that a permanent physical occupation of property is a taking"); *Levald*, *supra*, 998 F.2d at 684 (permanent physical occupation of property sufficient to support a takings claim occurs when the government physically intrudes upon private property either directly or by authorizing others to do so).

A taking also occurs when government takes title to property, in whole or in part, prior to any physical invasion. See *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (a taking occurs under the Fifth Amendment when "the government [has authorized] a physical occupation of property (or actually takes title)"); *Chicago, R.I. & P. Ry. Co. v. United States*, 284 U.S. 80, 96 (1931) (a taking "may result from a taking of the use of property . . . quite as well as from the taking of the title"). Additionally, a taking can occur when government action creates a cloud on the title to property that decreases its value. See *J.B. Ranch v Grand County* 958 F.2d 306, 309 (10th Cir. 1992) (a cloud on title to property causing a diminution of land values constitutes a taking).

2. The *Nollan* and *Dolan* Cases

In both *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, two Supreme Court cases involving development exactions,[37] the Court held that government action constituted a physical taking because it deprived the property owner of the right to exclude others from the property. *Nollan* held "that a 'permanent physical occupation' ha[d] occurred, for purposes of [the *Loretto*] rule, where individuals [were] given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, *supra*, 483 U.S. at 832. Courts have interpreted "*Nollan* and *Dolan* . . . as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure." *Clajon, supra*, 70 F.3d at 1578; see also *Nollan*, *supra*, 483 U.S. at 841 (stating that the Court will be "particularly careful" in assessing cases where an owner is required to convey property in exchange for the lifting of a land-use restriction because of the "heightened risk" that the purpose of the exaction is "avoidance of the compensation requirement, rather than the stated police power objective"); *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) ("Because *Nollan* and *Dolan* both involved physical invasions of private property, the Court found the exactions were *per se* takings").

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[37] A "development exaction" is a governmental requirement that a property owner dedicate some portion of his or her land for public use before granting that property owner a permit to develop the land. This 'exaction' of land often involves the actual deeding of some of the property to the public—either through an easement or an outright transfer of the land. See *Clajon Production Corporation v. Petera*, 70 F.3d 1566, 1578, n. 20 (10th Cir. 1995).

In *Nollan*, which is factually most similar to the case at bar, the owners of a beachfront lot proposed to demolish a small bungalow on the property and build a larger house. As required by California law, they applied to the California Coastal Commission for a building permit. The Commission issued a building permit conditioned on the property owners' recordation of a deed restriction granting a public access easement over their land. *Nollan*, *supra*, 483 U.S. at 828. The Court affirmed the rule "that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 824. It held, however, that to escape takings liability, there must be an "essential nexus" between the conditions imposed and the legitimate state interest identified. The Court concluded that the condition imposed by the Commission "utterly fail[ed]" to achieve its stated objectives—protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion. Thus, it concluded, the easement condition was nothing more than "an out-and-out plan of extortion." *Id.* at 837.

In the 1994 case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court granted certiorari to determine the degree of connection required between a development exaction and the impact of the property owner's proposed project. See *id.* at 377. *Dolan* involved an application to expand a plumbing and electrical supply store and pave a thirty-nine space parking lot. *Id.* at 379. Pursuant to its comprehensive development plan, the city granted a permit on the condition that the owner dedicate property along the creek behind the property for storm drainage, and an additional adjacent fifteen-foot wide strip as a pedestrian/bicycle pathway. The Court held that both conditions satisfied the "essential nexus" requirement announced in *Nollan*. The Court noted that the proposed

parking area would increase water runoff, that the state had a legitimate interest in controlling flood problems, and that the storm drainage condition was directly related to concern. Additionally, it stated that the store's expansion would increase traffic in the downtown area, that the state had a legitimate interest in reducing traffic congestion, and that the pedestrian/bicycle pathway would lessen increased traffic flow in nearby streets. *Id.* at 387-88.

Having determined that the requisite nexus was present, the Court next considered whether the degree of the exactions was consonant with the projected impact of the proposed development. Noting that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment," it placed the burden on the government to establish "rough proportionality" by making some sort of individualized finding. It stated that, while "[n]o precise mathematical formula is required, . . . the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset" the conditions created by the proposed development. *Id.* at 395-96. The Court held that proper findings of rough proportionality had not been made. *Id.*

In *Garneau*, the Ninth Circuit explained that *Nollan* and *Dolan* establish a three-part test for determining whether a taking has occurred in connection with the imposition of development conditions. "First the court asks whether government imposition of the exaction would constitute a taking. Second is the 'essential nexus' test, which asks whether the government has a legitimate purpose in demanding the exaction. Third is the "rough proportionality' test, which asks whether the exaction demanded is roughly proportional to the government's legitimate interests." *Garneau*, *supra*, 147 F.3d at 809. The court noted that "[t]he first inquiry ignores the government's land use power, and asks only whether government imposition of the exaction

would be a taking," while "[t]he second and third inquiries seek to determine whether the government may shield itself from a takings claim through the use of its police powers." *Id.* at 809, 810. For purposes of the present motion, then, the key question is the first—did the Commission's exaction of an irrevocable offer to dedicate an easement over the Property constitute a taking, or did any taking occur only later when the government perfected its title to the easement or the first uninvited person used the public access.

3. Application To The Instant Case

In *Nollan* and *Dolan*, the imposition of an allegedly unconstitutional condition resulted in the immediate dedication of property for public purposes. Thus, the government's imposition of conditions through the permitting process effected a physical invasion or occupation of the landowners' property. Here, by contrast, in 1974 and 1977, the Commission required that Johnson make an irrevocable offer to dedicate an easement over the Property, but the County did not immediately accept the offer. Similarly, in 1987, the Bucklews were required to extend the term of the irrevocable offer for a period of thirteen years.[38] Again, the County did not immediately accept the offer. Nonetheless, in each instance, the Commission exacted—and thus "took" from the property owners—the right to a future easement over the Property. The County obtained what was essentially equivalent to an option which was valuable to it and gave it a property interest under California law. See *County of San Diego v. Miller*, 13 Cal.3d 684, 693 (1975) (owner of an unexercised option to purchase land possesses a property right). At a minimum, from the time it was made, the irrevocable offer placed a cloud on title to the Property and

[38] Because the court concludes that any taking that occurred took place as early as 1974, it need not decide whether the extension of the irrevocable offer's term effected an additional taking.

diminished its value. Thus, the alleged taking occurred at the point when the government exacted the concession from the property owners. The fact that there was no physical entry on the land until later does not alter this fact.[39]

Plaintiffs contend that, if this is true, the County's acceptance of the irrevocable offer to dedicate in 1998 should nonetheless be treated as a separate taking under either a "continuous" or "incremental" takings theory. Continuous takings have been found where the government allows a taking to occur by a continuing process of physical events, such as by gradual flooding. In such a case, the plaintiff may postpone filing suit until the nature and extent of the taking becomes clear. See *United States v. Dickinson*, 331 U.S. 745, 749 (1947). In *Dickinson,* the Supreme Court refused to set a firm date upon which a takings claim based on flooding caused by a dam accrued, stating that, in cases involving intermittent flooding, plaintiff's cause of action does not accrue until "the situation becomes stabilized." *Id.* Thus, the

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[39] Plaintiffs contend that no taking occurred in 1974, 1977 or 1987 because the irrevocable offer granted by Johnson and extended by the Bucklews was void *ab initio*, or became void following the Supreme Court's 1987 decision in *Nollan*. Because the Nollans challenged the Coastal Commission's permitting procedures "as applied" to them, the decision in their favor did not void other dedications exacted by the Commission. *Nollan, supra*, 483 U.S. at 837-38; see also *id.* at 852, n. 6 (Brennan J., dissenting) (the case "is a challenge to the permit condition as applied to the Nollans' property, so the presence or absence of seawalls on other property is irrelevant"). Indeed, the core holding of *Nollan* and *Dolan* is that there must be an individualized inquiry into the "nexus" between the condition imposed and the impact of the proposed development, as well as their "rough proportionality." The alleged failure to conduct this type of inquiry prior to imposing conditions on Johnson's permits might well have resulted in a finding of unconstitutional taking had the matter been raised when the conditions were imposed. The fact that neither Johnson nor the Bucklews mounted such a challenge or sought "just compensation," however, does not now render the conditions void.

plaintiff in such a case may postpone filing suit until "the consequences of inundation have so manifested themselves that a final account may be struck." *Id.* Invoking *Dickinson*, plaintiffs assert that the situation regarding the Property did not become stable, and their damages ascertainable, until the County accepted the irrevocable offer to dedicate.

The Supreme Court and other courts have interpreted *Dickinson* narrowly. In *United States v. Dow*, 357 U.S. 17, 27 (1958), the Court stated that *Dickinson* held only that the statute of limitations does not bar a takings claim based on flooding "when it [is] uncertain at what stage in the flooding operation the land ha[s] become appropriated to public use." Other cases have adopted this reading of *Dickinson* and its reference to "stabilization." See *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use"); *Kabua v. United States*, 546 F.2d 381, 384 (Fed. Cir. 1976) (in *Dow*, the Supreme Court "more or less limited [*Dickinson*] to the class of flooding cases to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking"); *Hilkovsky v. United States*, 504 F.2d 1112, 1114 (Ct.Cl. 1974) (*Dow* "distinguished the flooding situation in *Dickinson* from other types of Government taking because, in the slow flooding situation in *Dickinson*, the full extent of the Government taking could not be known until the high water mark of the flooding bad been reached"); *Cavin v. United States*, 19 Cl. Ct. 190, 197 (1989) (finding that the *Dickinson* stabilization doctrine was inapplicable where the Forest Service's actions were deliberate and discrete; "the stabilization doctrine speaks to situations involving continuing physical processes, such as gradual flooding").

The events underlying this case are not easily analogized to flooding or other continuous natural processes where stabilization is difficult to pinpoint. A taking either did or did not occur when the Commission imposed conditions on Johnson's permits, and when the Bucklews extended the irrevocable offer to dedicate. If it did, then its value could have been fixed, much as an option to purchase land may be valued and reduced to a sum certain. *Dickinson*, therefore, does not support plaintiffs' invocation of a continuous takings theory here.

Plaintiffs alternatively contend that there have been multiple, incremental takings in this case. Under this theory, the first takings occurred when permit conditions were imposed in 1974 and 1977. An additional taking occurred when the Coastal Commission required that the Bucklews extend the irrevocable offer to dedicate for a period of thirteen years. The exaction from the Bucklews may well have constituted a second taking, since the government extracted an extension of the term of the offer without compensation. See *A.J. Hodges Industries, Inc. v. United States*, 355 F.2d 592 (Ct.Cl. 1966) (flights of Government-owned B-47 aircraft over private land constituted the taking of an easement in the overhead airspace if the flights were so low and frequent as to interfere directly and immediately with the use and enjoyment of the land, and the introduction of B-52 bombers, which were twice as large as the B-47s and noisier, constituted an additional taking). Plaintiffs contend that yet another taking occurred when the County accepted the irrevocable offer to dedicate. They assert that this action was significantly more invasive of their property rights, and that it was not until the County accepted the offer that they lost their right to exclude others from the Property.

What the plaintiffs claim has been taken from them was, in fact, taken from Johnson in 1974 and 1977, and/or from the Bucklews in 1987. If Johnson or the Bucklews *had* sought

and received just compensation for those taking when they occurred, plaintiffs could not now claim additional compensation based on the County's acceptance of the offer to dedicate. The fact that the prior owners failed to seek or receive just compensation does not change the fact that a taking occurred. Thus, the court concludes that any taking that occurred took place at the time the condition requiring that Johnson make the irrevocable offer to dedicate was imposed and/or at the time the Buckews were required to extend the term of the offer.

D. Standing To Sue

The County contends that plaintiffs lack standing to bring a takings claim because the offers to dedicate were obtained from prior owners of the Property, and plaintiffs did not acquire the property until years later in 1997. Because plaintiffs did not own the property when the offers were exacted, the County contends they never acquired the interest purportedly taken, and consequently lack standing to assert a Fifth Amendment claim.

What has been taken from the bundle of a property owner's rights cannot be transferred to a subsequent owner. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if . . . inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"); *Danforth v. United States*, 308 U.S. 271, 284 (1939) (it is undisputed that "since compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment"); *United States Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir.), cert. denied, 469 U.S. 982 (1984) ("Only the owner of an interest in property at the time of [an] alleged taking has standing to assert that a taking has occurred"); *Cavin v. United States*, 956 F.2d 1131,

1134 (Fed.Cir. 1992) (claimants could not maintain suit alleging that the government took real property without just compensation unless they established undisputed ownership of the property at time of the taking); compare *Nollan*, *supra*, 483 U.S. at 827-28 (although the Nollans had not acquired ownership of the property prior to the State's decision to condition a coastal development permit on their consent to an easement, they held a leasehold interest with an option to buy).

Plaintiffs have not alleged that they purchased the property without notice of the permit condition and irrevocable offer to dedicate, both of which were recorded and evident in the chain of title. See *United States v. Dow*, 357 U.S. 17, 20 (1958) (it was not inequitable that a subsequent owner had no takings claim since he "took his deed with full notice of the condemnation proceeding," and had "readily available contractual means by which he could have protected himself vis-a-vis his grantors against the contingency" that he would have no claim). The price plaintiffs paid for the land was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it.[40] "A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133,

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[40] Because plaintiffs and the seller had full information regarding the irrevocable offer to dedicate, and the *Nollan* decision, the market price would account for the risk that the County would accept the outstanding offer. This follows from the efficient market hypothesis, that market prices "at any time 'fully reflect' all available information." Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383, 383 (1970).

1136 (9th Cir.1997) (en banc). Consequently, plaintiffs lack standing to challenge the exaction under the Takings Clause of the Fifth Amendment.

Nor can plaintiffs acquire standing by claiming that a separate taking occurred when the County voted to accept the offer to dedicate. The mere exercise of a pre-existing right does not effect a taking. See *Lucas, supra*, 505 U.S. at 1028-29 ("we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"); *United States v. 30.54 Acres of Land, More or Less*, 90 F.3d 790, 792 (3rd Cir. 1996) (holding that because a "navigational servitude was a preexisting limitation on the landowners' title to riparian land, . . . the [government's] exercise of the servitude to prohibit the use of the landowners' property was not a taking under the Fifth Amendment"). Because the irrevocable offer was made prior to the time the Property was conveyed to plaintiffs, the taking had already occurred, and they have no standing to challenge it at this point."[41]

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[41] The fact that the County might not have exercised its right to accept the irrevocable offer does not alter the analysis. See *DeAnza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991). In *DeAnza*, plaintiffs argued that their takings cause of action did not accrue until the county amended a mobile home rent control ordinance to remove the sunset provision with which it was originally enacted. *Id.* at 1086. Discussing its earlier decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir.1986), cert. denied, 485 U.S. 940 (1988), the court noted that the city in that case had argued that no takings cause of action had accrued because "the ordinance could be repealed and was not permanent." *Id.* at 1087 (citing *Hall, supra*, 833 F.2d at 1277). The court observed that it had rejected this argument, holding "that the possibility of repeal did not change the nature of the taking," since "the possibility that an action may be repealed or 'undone' does not affect the existence of a taking claim." *Id.* As respects deletion of the sunset provision in the rent control ordinance before it, the *DeAnza* court stated: "The county's amendment in 1987 giving the ordinance an indefinite rather than a

E. Statute Of Limitations

The Ninth Circuit has utilized the statute of limitations analysis developed in connection with 42 U.S.C. § 1983 claims to determine whether regulatory takings claims are time-barred. See *Levald*, *supra*, 998 F.2d at 684, 687-88. Thus, an action arising in California prior to 1985 is governed by a three-year statute of limitations (*Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)), while the limitations period for a California action accruing after 1985 is one year (*Levald, supra*, 998 F.2d at 688). A Fifth Amendment claim accrues when the taking occurs. *Alliance of Descendants of Texas v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). Even assuming plaintiffs had standing to challenge the constitutionality of the Commission's actions vis-a-vis their predecessors-in-interest, therefore, the action would nonetheless be time-barred, since, measured from the date the purportedly unconstitutional conditions were exacted —1974 and 1977—or from the date on which the irrevocable offer was extended in 1987, the statute of limitations expired years before plaintiffs brought this suit."[42]

F. Ripeness Of Plaintiff's' Takings Claim

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court established two distinct requirements that

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definite duration did not create an entirely new cause of action for purposes of the statute of limitations." *Id.*

[42] Plaintiffs and their predecessors-in-interest similarly failed to seek state compensation in a timely fashion. See *Hensler v. City of Glendale*, 8 Cal.4th 1, 22 (1994) ("if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision. Government Code section 66499.37 establishes a 90-day period of limitation for these actions. Thus, there is no uncertainty regarding the commencement of the [statute of limitations] period"), cert. denied, 513 U.S. 1184 (1995).

must be met before a takings claim is ripe for decision. First, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, plaintiffs must have sought "compensation through the procedures provided by the State for obtaining such compensation." *Id.* at 195. See also *The San Reno Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) ("In order to assert an as-applied takings claim, a plaintiff must establish two things: (1) the governmental entity has reached a final decision on the applicability of the regulation to the plaintiff's property; and (2) the plaintiff is unable to receive just compensation from the government"). "Both the final decision and compensation elements must be ripe before the claim is justifiable." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995).

It is the second prong of this test that is at issue in this case, i.e., that a "takings claim . . . is unripe until the owner has sought, and been denied, just compensation by the state." *The San Remo Hotel*, *supra*, 145 F. 3d at 1101 (citing *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th. Cir. 1996), cert. denied, 118 S.Ct. 1386 (1998), and *Levald*, *supra*, 998 F.2d at 686). This requirement is rooted in the text of the Constitution, for "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson*, *supra*, 473 U.S. at 194. "So long as the state provides 'an adequate process for obtaining compensation,' no constitutional violation can occur" until just compensation is denied. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (quoting *Williamson*, 473 U.S. at 194-95), cert. denied, 494 U.S. 1016 (1990), overruled on other grounds in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Thus, a plaintiff cannot bring a takings action until the state denies just compensation because the cause of action does not accrue until that point. See *Williamson*, *supra*, 473 U.S. at 195 ("a

property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation"); *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) (takings claim not ripe where plaintiffs had not "been turned away empty-handed" at the state level), cert. denied, 502 U.S. 1096 (1991).

A review of the procedural history in *Nollan* discloses what Johnson or the Bucklews should have done to preserve a claim—when the permit condition was exacted, or the recording of the irrevocable offer to dedicate was demanded, they should have exhausted their administrative remedies before the Coastal Commission and thereafter filed a petition for writ of mandate in the Superior Court. See *Nollan*, *supra*, 483 U.S. at 829; see also *Jama Const. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991) (takings claim dismissed as unripe where plaintiff "did not seek compensation through California procedures before bringing its federal action"), cert. denied, 503 U.S. 919 (1992). Similarly, even if the Board of Supervisors' resolution accepting the irrevocable offer constituted a new or different taking, plaintiffs do not allege that they initiated administrative or state judicial proceedings to obtain just compensation. In fact, they disavow any interest in pursuing compensation damages in this suit. Thus, even if they had standing and their claim was timely, it would not be ripe and thus not justifiable.

G. Pendent State Claims

In addition to their single federal claim, plaintiffs have alleged three pendent state claims—a taking under the California Constitution, quiet title, and violations of CEQA. When the court has dismissed all claims over which it has original jurisdiction, it may, in its discretion, decline to exercise supplemental jurisdiction over the remaining state

law claims. 28 U.S.C. § 1367(c)(3). See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, n. 7 (1988); *Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1046 (9th Cir. 1994) ("'[i]n the usual case in which federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims'"); *Schneider v. TRW, Inc.*, 938 F.2d 986, 992-93 (9th Cir. 1991) (holding that the district court has discretion to dismiss state law claims after dismissing all federal claims on summary judgment); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) ("Generally, dismissal of federal claims before trial dictates that the pendent state claims should also be dismissed"); *Wren v. Sletten Const. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) ("When the state issues apparently predominate and all federal claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim").

Here, the court has determined that the County is entitled to dismissal of the only federal claim alleged in plaintiffs' complaint. Accordingly, it declines to exercise supplemental jurisdiction over the remaining state law claims. Because jurisdiction in this case was premised on the existence of a federal question, and because the court has dismissed that claim, plaintiffs' claims for quiet title, taking under the California Constitution and CEQA violations are dismissed without prejudice.

III. CONCLUSION

Since the court has determined that plaintiffs have no standing to assert a Fifth Amendment takings claim, that such claim is barred by the statute of limitations, and that the claim is not ripe, the court assumes that plaintiffs cannot amend to cure the deficiencies that presently exist in the pleading. For this reason, the County's motion to dismiss is granted without leave to amend.

DATED: October 6, 1999

/s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

APPENDIX C

Califonia Coastal Commission

PublicAccess

ActionPlan

June1999

[Excerpt]

* * * *

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OTDs are only *offers* of easements however. The interest belongs to the property owner until the offer is accepted by a government agency or a nonprofit organization. Typically the term of the offers is 21 years from the date of recording. The Coastal Act requires that the easement not be opened for public use until there is an accepting agency that will assume responsibility for liability and maintenance of the access segment (Section 30212 of the Coastal Act). The responsibility of the accepting agency is to manage the easement area to provide safe public access as well as to protect private property rights. Once an OTD is accepted, the accepting entity obtains title to the easement. The easement then remains in the public domain in perpetuity; it can not revert back to private ownership. The easement can, however, transfer from one public agency to another, or to a nonprofit organization. (Fee title of the entire parcel, however, remains with the property owner.)

* * * *

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No. 02-107

In The

Supreme Court of the United States

ANN DANIEL and LEONARD HILL,

Petitioners,

v.

COUNTY OF SANTA BARBARA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a landowner may challenge a county's acceptance of an irrevocable offer of dedication as an unconstitutional taking in federal court, where the landowner did not first seek compensation under state law procedures and where, in any event, the landowner and his predecessor did not timely challenge the permit condition requiring the offer of dedication but instead voluntarily complied with the permit condition and accepted the benefits of the permit?

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INTRODUCTION

In this petition, the current owners of coastal property seek to avoid the legal obligation to provide public access that their predecessor in interest voluntarily assumed in 1974 when he obtained a coastal development permit for the approval of a subdivision. This legal obligation was affirmed in 1978 when the landowner accepted a second coastal development permit to construct a house on one of the subdivided lots and again in 1987 when the next landowner recorded a formal offer to dedicate the easement in compliance with the conditions of approval. The current landowners, Ann Daniel and Leonard Hill (the "Daniels"), request that the Court review the Ninth Circuit's decision rejecting their claim that Santa Barbara County's acceptance of the 1987 irrevocable offer of dedication constituted a "taking." The Daniels' petition presents no important federal questions and should be denied:

- The Daniels' federal court claim is not ripe under the second prong of this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985), which requires a plaintiff seeking relief for an alleged taking to seek "compensation through the procedures the State has provided for doing so," before a claim may be pursued in federal court.

- The doctrines of res judicata and waiver bar a successor landowner from collaterally attacking permit conditions where the predecessor landowner did not challenge the permit condition but instead voluntarily complied with the permit condition and accepted the benefits of the permit. See, *e.g.*, *California Coastal Comm'n v. Superior Court ("Ham")*, 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.App. 1989); *Rossco Holdings,*

Inc. v. State of California, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (Cal.App. 1989), *cert. denied,* 494 U.S. 1080 (1990).

- There is no conflict among the courts, because both state and federal courts have found that a landowner may not collaterally attack an offer of dedication required as a permit condition after the statute of limitations has expired and where the landowner has obtained the benefits of the permit. *E.g., Ham; Leroy Land Development Co. v. Tahoe Regional Planning Agency*, 939 F.3d 696, 698-699 (9th Cir. 1991).

- Even putting aside that the Daniels' takings claim is barred by res judicata and waiver, their takings claim based on County's acceptance of the irrevocable offer is meritless because it is based on a misunderstanding of California law regarding property dedications. Once a landowner records an irrevocable offer of dedication, his ability to exclude the public terminates upon acceptance of the offer. The Daniels, as successors in interest, have no greater property rights than what their predecessors conveyed to them. See *Ojavan Investors v. California Coastal Comm'n*, 26 Cal.App.4th 516, 528, 32 Cal.Rptr. 103 (Cal.App. 1994), *cert. denied*, 513 U.S. 1148 (1995). Because the Daniels' predecessors had no right to object to the County's acceptance of the irrevocable offer of dedication, neither did the Daniels.

The Daniels' petition a for writ of certiorari should be denied.

STATEMENT OF THE CASE

The Daniels purchased beachfront property in Santa Barbara County in 1997. Pet. App. 2a. This property had once been part of a larger parcel owned by Carl Johnson, which he subdivided in 1974 into four separate parcels. *Id.* A regional commission of the California Coastal Commission approved the division conditioned on Johnson's recordation of a 25-year "firm continuing" irrevocable Offer to Dedicate to County a five-foot wide pedestrian and bicycle easement across the property. *Id.*

Johnson appealed the imposition of the condition to the California Coastal Commission ("Commission"), which affirmed the regional commission's decision. *Id.* Johnson did not seek judicial review of this administrative decision. *Id.* This condition was reimposed in 1977 when Johnson applied for and received a permit from the Commission to build a house on the parcel now owned by the Daniels. Pet. App. at 4a. Johnson did not challenge the condition and built the house in 1978. *Id.*

In 1987, W. Bruce and Darlene Bucklew ("the Bucklews"), who acquired the parcel from Johnson, were required by the Commission to record a 25-year "irrevocable" Offer to Dedicate for the same five-foot easement because Johnson had failed to comply with the 1977 permit condition requiring the offer of dedication. Pet. App. at 4a & 22a. The Bucklews did not challenge the Commission's request and proceeded to record the offer to dedicate. Pet. App. at 4a. All three offers were matters of public record. Pet. App. at 2a. In 1997, the Daniels acquired the property from the Bucklews. Pet. App. at 2a.

In 1998, and within the 25-year period, County accepted the Bucklews' offer to dedicate the easement. *Id.*

The Daniels challenged County's actions in federal district court, alleging a violation of the Takings Clause of the Federal Constitution. *Id.* The Daniels sought declaratory and injunctive relief only, declining to seek compensation. Pet. App. at 6a. Neither Johnson, the Bucklews, nor the Daniels ever sought compensation for an alleged taking in any state proceeding.

On County's motion, the district court dismissed the takings claim, holding that the Daniels lacked standing because their property was subject to the offer to dedicate at the time they purchased it. Pet. App. at 4a. Alternatively, the district court held that the takings claim accrued in 1974 and 1977, and in any event no later that 1987, and was therefore time-barred. *Id.* Further, the district court held that even if the Daniels had standing and their takings claim was not time-barred, the claim was not ripe because the Daniels could not allege that the state had refused to compensate them or their predecessors in interest for the alleged taking. Pet. App. at 5a. The district court also dismissed the Daniels' supplemental state law claims. *Id.*

The Daniels appealed the dismissal of their takings claim. In a reported decision, the Ninth Circuit affirmed the decision of the district court. *Daniel v. County of Santa Barbara*, 288 F.3d 375 (9th Cir. 2002). The Ninth Circuit determined the claim was not ripe under the second prong of this Court's holding in *Williamson County*, which requires a plaintiff seeking damages for an alleged taking to seek compensation first in state proceedings before seeking relief in the federal courts. Pet. App. at 7a. The Court stated:

> . . . the second *Williamson County* requirement does not appear to have been satisfied. Neither Johnson nor the Bucklews ever attempted to use state procedures to obtain just compensation from the Commission, which exacted the offers to dedicate, or from the County of Santa Barbara, to which the offers were made. Assuming that adequate state procedures were available to seek such compensation, the failure of Johnson and the Bucklews to seek just compensation meant that they never created ripe federal takings claims.

Pet. App. at 8a.[1]

Alternatively, the Ninth Circuit found that if there had been no adequate state compensation remedy available in California until 1987 when this Court decided *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), then the claim was ripe as soon as the Commission's decision was final. Pet. App. at 8a, citing *Williamson County* 473 U.S. at 194-197. In such case, the Ninth Circuit concluded the claim was barred by the statute of limitations. Pet. App. at 9a.

In concluding the claims were barred by the statute of limitations, the Court determined that the imposition of the permit conditions requiring an irrevocable offer of

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[1] The Ninth Circuit assumed the alleged taking was a "regulatory taking," (Pet. App. at 6a) but noted that even if the takings claim was a physical taking, it made no difference as to the application of the second requirement of *Williamson County* (Pet. App. at 9a). "In a physical takings case, as in a regulatory takings case, the property owner must have sought compensation for the alleged taking through available state proceedings." *Id.*

dedication was like the taking of an option and the taking of the options occurred in 1974, 1978, and 1987. Pet. App. at 11a. Because the County did not have to pay anything to exercise the option, the Ninth Circuit determined that "the value of what was taken from Johnson and the Bucklews was the full value of the easement." *Id.* Therefore, when the Daniels purchased the property from the Bucklews, the offer to dedicate had already been taken from the predecessor in interest and "County's acceptance of one of those offers took nothing from the Daniels that had not already been taken." *Id.*

Further, the Ninth Circuit found that the Daniels had "purchased their property with notice of the [conditions and recorded offer to dedicate]. They cannot by virtue of their purchase, obtain greater rights than those held by their predecessors in interest." Pet. App. at 10a. On these facts, the court held that this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), did not resurrect the Daniels' takings claim.

Finally, the Ninth Circuit ruled that even if the takings claim was ripe under *Williamson County*, the Daniels' remedy was to seek compensation rather than declaratory and injunctive relief. Pet. App. at 13a. The Ninth Circuit held that if there is a constitutional infirmity in this situation, it is in the state's failure to pay for the taking, because, as stated by this Court in *Nollan v. California Coastal Commission* 483 U.S. 825, 841, 842 (1987), "California is free to . . . [use] its power of eminent domain for the 'public purpose,' . . . but if it wants an easement across the Nollans' property, it must pay for it." Pet. App. at 14a, quoting *Nollan*.

ARGUMENT

I. THE DANIELS' TAKINGS CLAIM DOES NOT MEET THE SECOND PRONG OF THE FEDERAL RIPENESS REQUIREMENT OF *WILLIAMSON COUNTY*.

The Daniels' petition is meritless for a variety of independent reasons, and none present important federal questions or a conflict among the courts. The first reason is noncompliance with the requirements of *Williamson County*. In *Williamson County*, 473 U.S. at 186, this Court identified two separate ripeness hurdles that a plaintiff must satisfy prior to seeking relief for a takings claim in federal court: the final decision requirement and the state compensation requirement. As reiterated in by this Court in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S.Ct. 1659 (1997):

> *Williamson County* . . . explained that a plaintiff must demonstrate that she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations,' *id.*, at 186, 105 S.Ct., at 3116, and sought 'compensation through the procedures the State has provided for doing so,' *id.*, at 194, 105 S.Ct., at 3120.

Id. at 734, 117 S.Ct. at 1665.

The state compensation requirement means that takings claims against local and state governments must begin in state courts. Indeed, before it issued its decision in *Daniels v. County*, the Ninth Circuit has routinely and uniformly applied *Williamson County* to dismiss federal takings claims where the plaintiff did not first seek compensation through available state court procedures. See,

e.g., *Macri v. King County*, 126 F.3d 1125, 1130 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998) (dismissing takings claim for failure to first seek relief in state court); *Jama Construction v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992) (dismissing claim because "Jama did not seek compensation through California procedures before bringing its federal action."); *Lai v. City & County of Honolulu*, 841 F.2d 301, 303 (9th Cir. 1988), *cert. denied*, 488 U.S. 994 (1988) (dismissing claim because plaintiffs failed to "pursue all avenues of relief before presenting a takings claim in federal court"). Moreover, this requirement has been uniformly applied by the Circuit Courts. See *Dodd v. Hood River County*, 59 F.3d 852, 859 n.3 (9th Cir. 1995), *cert. denied*, 525 U.S. 923 (1998) (citing cases from the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits).[2]

Therefore, under the second prong of *Williamson County*, the petition should be denied.

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[2] Petitioners suggest that this issue is being reviewed by this Court in *Washington Legal Foundation v. Legal Foundation*, 70 U.S.L.W 3751 (U.S. June 10, 2002) (No. 21-1325). The issues raised in that case, however, are far different from the land use context, as that review focuses on the Ninth Circuit's holding in *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (9th Cir. 2001), which rejected a challenge that the Washington State Interest on Lawyers' Trust Account ("IOLTA") program unconstitutionally took the interest generated by their monies placed in IOLTA trust accounts.

II. THE PETITION SHOULD BE DENIED BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS AND DOCTRINES OF RES JUDICATA AND WAIVER.

Even if the second prong of *Williamson County* did not prevent the Daniels from bringing this claim in federal court, the Daniels' challenge to the offer of dedication required by the Coastal Commission was barred many years ago.

A. The Claim Is Barred By the Statute of Limitations and Res Judicata.

As an alternative to its holding that the Daniels' claim is not ripe, the Ninth Circuit determined that the claim was barred by the "applicable" statute of limitations. Pet. App. at 9a. For takings claims under 42 U.S.C. section 1983, the applicable statute of limitations is the state statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 275, 105 S.Ct. 1938, 1946-1947, 85 L. Ed. 2d 254, 266 (1985). Although the Ninth Circuit did not specify which statute of limitations it had applied, the district court held that in California the claim was barred either by the three-year (for claims prior to 1985) or one-year (for post 1985 claims) statute of limitations. Pet. App. at 42a. The district court further noted that any claim in state court for compensation must be filed within 90 days of the date of the final adjudicatory administrative decision. *Id.* n. 42, citing *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 32 Cal.Rptr.2d 244, 876 P.2d 1043, 1047 (Cal. 1994) and Cal. Gov. Code

§ 66499.37.[3] Regardless of which statute of limitations applied, it is clear that the time to file a claim challenging the exaction of an offer of dedication that first occurred in 1974 expired long before the Daniels acquired the property in 1997.

If a landowner fails to file a timely challenge, the Coastal Commission's subdivision approval or permit decision becomes final, and the application of state law principles of res judicata and collateral estoppel renders the Commission's decision "immune from collateral attack, either by inverse condemnation action or by any other action." *Patrick Media Group, Inc. v. California Coastal Comm'n,* 9 Cal.App.4th 592, 608, 11 Cal.Rptr.2d 824, 833 (Cal.App. 1992).

Applying this rule, the California courts repeatedly have rejected collateral attacks on permit conditions, including public access conditions, where the time for properly challenging the Commission's decision has long since passed. See *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.App. 1989) (rejecting collateral attack on access condition where landowner failed to file timely challenge, complied with condition and accepted benefits of permit); *Rossco Holdings,* 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (Cal.App. 1989), *cert. denied,* 494 U.S. 1080 (1990) (barring collateral attack on access conditions where applicant failed to timely file a challenge to conditions); *Ojavan Investors,* 26 Cal.App.4th 516, 32 Cal.Rptr.

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[3] County has consistently argued in this case that the 90-day statute of limitation of Cal. Gov. Code § 66499.37 applies. See, *e.g.*, ER 0049.

103 (Cal.App. 1994), *cert. denied,* 513 U.S. 1148 (1995) (failure to timely challenge permit conditions renders them immune from collateral attack by successor in interest).

In this case, the original landowner, Johnson, never filed an action challenging the either the Coastal Commission's 1974 approval of the subdivision or the 1977 building permit. Nor did the Bucklews challenge the 1987 requirement that they record the irrevocable offer to dedicate. As a result, under uniform principles in both the federal and state courts, the statute of limitations and doctrine of res judicata bar the Daniels' claim. *Ham; Rossco Holdings*; *see Leroy Land Development Co.* at 698-699.

B. The Claim Is Barred By Waiver.

The Daniels' collateral attack on the permit conditions is also barred under California's waiver doctrine. Under this doctrine, a challenge to a permit condition by a landowner or his successor in interest is waived when the landowner complies with the permit condition or accepts the benefits of the permit. *County of Imperial v. McDougal,* 19 Cal.3d 505, 510-12, 564 P.2d 14, 17-18, 138 Cal.Rptr. 472, 474-75 (Cal.), *app. dismissed*, 434 U.S. 944 (1977). California courts frequently have applied this rule against collateral attacks on permit conditions. *Rossco Holdings,* 212 Cal.App.3d at 654, 260 Cal.Rptr. at 742 (waiving challenge to access condition by receiving benefits of permits and by complying with condition); *see Ojavan Investors, Inc.,* 26 Cal.App.4th at 527-28, 32 Cal.Rptr.2d at 110, *City of Santee v. Superior Court*, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (Cal.App. 1991); *Pfeiffer*

v. City of La Mesa, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (Cal.App. 1977).

Applying this state law rule, the permit "runs with the land" and the Daniels succeeded to the benefits of the permit issued to Johnson. The Daniels cannot now challenge the condition placed on issuance of that permit. Consequently, the Daniels' petition should be denied.

III. THE DANIELS' MANUFACTURED TAKINGS CLAIM IS BASED ON A MISTAKEN VIEW OF CALIFORNIA REAL PROPERTY LAW.

Even if the Daniels could avoid *Williamson County's* second prong and were allowed to bypass the statute of limitations and the doctrines of res judicata and waiver, their takings claim would not present an important issue of federal law.

A. The Daniels' Taking Theory Does Not Present An Important Issue of Federal Law.

Implicitly realizing the untimeliness of their action, the Daniels seek to manufacture a takings claim by their dual taking theory – that the imposition of a permit condition requiring an offer of dedication constitutes one taking and that County's 1998 acceptance of the irrevocable offer of dedication is a second, legally distinct taking. Pet. at 17. The Daniels, however, do not point to any reported decision, treatise, law review article or other legal source that supports this peculiar theory.

Inventing a new legal theory does not make it an important new issue of federal law. Nor do the Daniels elevate this issue in importance by pointing to "literally

hundreds of other offers . . . are soon to expire." Pet. at 18. Even if these offers ever get accepted, the Daniels are presumptuous in assuming that other landowners also will seek to renege on legal obligations that they voluntarily undertook.[4]

The Daniels also argue that the Court should grant the petition because landowners have "little incentive" to contest the initial offer of dedication, thereby encouraging governments to use the offer of dedication "scheme" to circumvent the requirements of *Nollan*. Pet. at 19. This assertion is incredible. Cases such as *Hensler*, *Ham*, *Rossco*, and *Patrick Media* for years have provided landowners notice that they are legally required to bring a challenge to a permit condition when the condition is first imposed, and cases such as *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S.Ct. 2309 (1994) give the permittee every incentive to challenge the imposition of the original permit condition if government oversteps its authority. Notwithstanding the Daniels' empty claims of "coercion" and "extortion," there is no reason to create a new constitutional rule that would allow landowners to challenge the acceptance of irrevocable offers of dedication many years after they have accepted permit conditions and enjoyed the benefits of the permit. See *Leroy Land Development Co.*, 939 F.3d at 698-699 (challenge to settlement agreement imposing conditions of development five years after execution, based on a subsequent takings

[4] Indeed, the Daniels completely overstate the issue. In Santa Barbara County, of the 72 outstanding offers to dedicate accepted by County, see Cole Pet. at 4, only two landowners (Cole and Daniel) have chosen to challenge County's acceptance.

analysis articulated in *Nollan*, rejected because it " . . . would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind").

B. The Daniels' Takings Claim Is Meritless

In any event, the Daniels' underlying takings claim is meritless, even putting aside that it is barred by res judicata and waiver. The Daniels' claim that County's acceptance of an irrevocable offer of dedication constitutes a separate compensable taking is founded on a mistaken understanding of the property "right" retained by a landowner after the landowner has recorded an irrevocable offer of dedication. As the Daniels properly concede, state real property law must measure the property interest claimed to be taken. Pet. at 10. In the Daniels' view of California law, the public does not "acquire any right to the easement" until the offer is accepted. Pet. at 11-12.

The Daniels' theory that County's acceptance of an irrevocable offer of dedication is a separate taking is based on a misreading of California real property law. Once the landowner records an irrevocable offer of dedication, he has conveyed away the right to exclude the public should the irrevocable offer ever be accepted and opened to the public. In this case, for example, the irrevocable offer granted by the Daniels' predecessor states that:

> . . . offer[ing] for dedication to the County of Santa Barbara or its successor in jurisdiction, for recreational pedestrian and bicycle access an easement 5' in width from Padaro Lane to the mean high tide line. . . . Said offer shall be a *firm continuing offer of dedication* which is not rejected or vitiated by failure to accept or purported rejection for a period of 25 years, unless

> the County has in the meantime provided beach access within a distance of 300 yards upcoast or downcoast of this parcel. The offer of dedication shall be conditioned on assumption by the County of Santa Barbara or its successor, of the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement.

Pet. App. at 2a. (Emphasis by Ninth Circuit.)

Therefore, although the landowner may have the qualified right to exclude others while the irrevocable offer of dedication is outstanding, that right is subject to immediate extinction once the agency accepts the offer. A public agency's acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right; it is the public's exercise of a right that the landowner explicitly conveyed away when he made the irrevocable offer of dedication. *See, e.g., Ojavan Investors,* 26 Cal.App.4th at 528, 32 Cal.Rptr. at 110 (finding that prior landowner had waived right to challenge deed restrictions by having accepted the benefits of the permit and that current landowner can take "only the title [the prior owner] had and subject to prior recorded instruments").

As recognized by the Ninth Circuit, under both federal and California law, an irrevocable offer of dedication is like an option, and the taking of an option occurs when the option is granted, not when it is exercised. Pet. App. at 10a; *and see Palo Alto Town & Country Village, Inc. v. BBTC Co.,* 11 Cal.3d 494, 502, 521 P.2d 1097, 1102, 113 Cal.Rptr. 705 (Cal. 1974) (the making of an option is an "irrevocable offer"); *Warner Bros. Pictures v. Brodel,* 31 Cal.2d 766, 772, 773, 192 P.2d 949, 952 (Cal.), *cert. denied,*

335 U.S. 944 (1948) (an "option contract gives the optionee a right against the optionor for performance of the contract . . . which the optionor cannot defeat by repudiating the option"). Thus, when County accepted the irrevocable offer, County's action took nothing from the Daniels "that had not already been taken." Pet. App. at 11a. The California authority upon which the Daniels rely concerns revocable offers of dedication, not irrevocable offers, Pet. at 11-12, and simply highlights that the Daniels' takings claim is entirely dependent on having this Court reach a different conclusion about the California law of property dedication.[5]

Finally, the determination that the acceptance of an irrevocable offer is not a taking accords with this Court's views in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, decided five years after *Nollan*, this Court acknowledged that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-29; and see *United States v. 30.54 Acres of Land*, 90 F.3d 790, 792 (3d Cir. 1996) ("Because the navigational servitude was a preexisting limitation on the landowners' title to riparian land, we hold the Corps'

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[5] The Daniels also rely on *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (Cal.App. 1985) to support their dual taking theory. Pet. at 11. In *Grupe*, the court upheld the Commission's imposition of a condition requiring the developer to make an offer of dedication to mitigate the impacts of his project. The court recognized the contingent nature of the residual "rights" of the landowner and that the landowner's ability to exclude existed only "*until such time as a public agency or private association agrees to accept the offer and concomitant responsibility to police the beach.*" *Grupe*, 166 Cal.App.3d at 170, 212 Cal.Rptr. at 592 (emphasis added).

exercise of the servitude . . . was not a taking[.]").Under California real property law, the recording of an irrevocable offer of dedication is a preexisting limitation on title that extinguishes any right to exclude the public once the irrevocable offer is accepted.

IV. THE DANIELS PRESENT NO IMPORTANT ISSUES OF RIPENESS.

The Daniels concurrent assertion that their takings claim was not ripe until County accepted the offer, Pet. at 15, fails for the same reason that it fails on the merits. Again, the Daniels' argument ignores that California law requires that any challenges to subdivision approvals and permit conditions, including constitutional challenges, must be brought within the time period for challenging the underlying administrative action. *See Hensler,* 8 Cal.4th at 22, 32 Cal.Rptr. at 257-258, *Ham,* 210 Cal.App.3d at 1493, 258 Cal.Rptr. at 568; *Rossco Holdings,* 212 Cal.App.3d at 657, 260 Cal.Rptr. at 744. Consequently, if there was a takings claim, it became ripe many years ago when the Commission imposed the permit condition exacting the offer of dedication.

Moreover, the acceptance of an irrevocable offer of dedication can never arise to a taking because, as discussed, once a landowner records an irrevocable offer of dedication, he irrevocably conveys any right to exclude the public if the offer of dedication is accepted. When County accepted the Bucklews' original offer of dedication, it simply exercised the property interest that the Daniels' predecessor had irrevocably conveyed to the public, and that the Daniels had no property interest to prevent. *County of San Diego v. Miller*, 13 Cal.3d 684, 693, 119 Cal.Rptr. 491, 532

P.2d 139 (1975) ("owner of an unexercised option to purchase land possesses a property right . . . "). Because a takings claim based on the acceptance of such an offer does not exist, it is pointless to consider when such a claim might "ripen."

The Daniels also appear to suggest that their ability to attack the subdivision map and permit conditions was somehow resurrected by this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *Palazzolo* indicated that a transfer of title does not necessarily bar a takings claim, even though the new owner acquires the property with knowledge of existing regulation. *Palazzolo,* however, did not eliminate the statute of limitations for takings claims, nor did it allow a subsequent landowner to assert a takings claim that the predecessor had already lost before the transfer. As the Ninth Circuit correctly held in this case, the Daniels' predecessor did not file a takings claim before the limitations period expired, but instead complied with the restriction and accepted the benefits of the permit. Therefore, the Daniels "purchased their property subject to the County's pre-existing options to accept dedication of an easement. . . . Because the full value of the easement had already been taken from the Daniels' predecessor, it took nothing of value from the Daniels." Pet. App. 13a. *Palazzolo* did not revive takings claims that had expired long before the new owner acquired the property.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

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Supreme Court, U.S.
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No. 02-107

IN THE

Supreme Court of the United States

ANN DANIEL AND LEONARD HILL,

Petitioners,

v.

COUNTY OF SANTA BARBARA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

In their opening brief, petitioners demonstrated that respondent's independent and discretionary decision to accept a previously coerced offer to dedicate an easement worked a legally distinct and unconstitutional deprivation of property. Respondent's opposition completely fails to refute petitioners' showing. Although it derides petitioners' takings claim as lacking support in any "decision, treatise [or] law review article," Opp. 12, respondent does not, because it cannot, dispute that petitioners lost the right to exclude others from their property only when, and because, the County accepted the offer. Respondent and the lower court are thus indisputably wrong in asserting that the County's acceptance "took nothing from the Daniels 'that had not already been taken'" from their predecessors in interest. *Id.* at 16 (quoting Pet. App. 11a).

Nor is there any merit to the various claims respondent raises in a vain effort to shield its unconstitutional conduct from review. Indeed, the County's ripeness, waiver, res judicata and statute of limitations arguments all founder for the same reason: petitioners' taking claim did not arise until the County accepted the offer to dedicate. Accordingly, that claim was not ripe in 1974, 1978 or 1987, when the Coastal Commission coerced the offer to dedicate from petitioners' predecessors in interest, and the failure of those prior owners to challenge the Commission's coercion cannot bar judicial review of a taking claim that first arose in 1998.

Finally, the fact that the Ninth Circuit has joined the California Supreme Court in permitting the County to flout this Court's rulings serves to underscore – not diminish – the need for this Court's review. Indeed, recognizing that this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), prevent the coercion of any new

offers to dedicate, California recently adopted legislation requiring the acceptance of all outstanding offers to dedicate at least 90 days before they are due to expire. Thus, unless this Court acts, respondent and other governmental entities in California will succeed in taking property from literally hundreds of other property owners in violation of this Court's rulings.

1. Respondent accuses petitioners of "[i]nventing" a "new" and "peculiar" takings theory that supposedly lacks support in "any reported decision, treatise [or] law review article." Opp. 12. But this Court long ago held that loss of the right to exclude others is a compensable taking. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). And respondent repeatedly concedes that its acceptance of the offer to dedicate stripped petitioner of this very right. Thus, the County acknowledges that the owner of property subject to an offer to dedicate retains the "right to exclude others while the irrevocable offer of dedication is outstanding," and that this right is "subject to immediate extinction *once the agency accepts the offer*." Opp. 15 (emphasis added); *see also id.* at 14 ("[o]nce the landowner records an irrevocable offer of dedication, he has conveyed away the right to exclude the public *should* the irrevocable offer *ever be accepted*.") (emphases added).

These concessions are compelled by California law, which unambiguously provides that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to an easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivanovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592 (Cal. Ct. App. 1985) (an offer to dedicate "will become effective *only if accepted*" and, until accepted, "there is no easement");

Baldwin v. *City of L.A.*, 83 Cal. Rptr. 178, 187 (Cal. Ct. App. 1999) (unconditional acceptance is required to complete a dedication). Accordingly, the owner of property subject to an offer to dedicate "can exclude the public from the privately owned portion of his [property] until such time as a public agency . . . agrees to accept the offer." *Grupe*, 212 Cal. Rptr. at 592. See also *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 15 (Cal. Ct. App. 1985).

Contrary to respondent's claim, petitioners have not "misread[]" California law by mistakenly relying on cases involving "revocable offers of dedication, not irrevocable offers," Opp. 14, 16. In *Grupe*, for example, the property owner was required to record a document "'*irrevocably offering to dedicate* . . . an easement for public access.'" 212 Cal. Rptr. at 581 (emphasis altered) (quoting offer to dedicate). *Grupe* thus involved precisely the same type of irrevocable offer to dedicate as the one at issue here, and the court made clear that the property owner would lose the right to exclude others only if and when such an offer was accepted.

More fundamentally, there is no meaningful distinction between a revocable offer to dedicate and an irrevocable offer that expires if not accepted within a prescribed period of time. In both cases, the mere fact of recordation does *not* inescapably lead to the loss of the right to exclude others. Instead, a public agency must accept the offer before a certain event occurs (revocation in the case of a revocable offer, expiration in the case of the irrevocable offer at issue here). Indeed, this is precisely why the California legislature recently enacted a law requiring acceptance of all outstanding, and soon-to-expire, offers to dedicate. See S.B. 1962, 2002 Leg., Digest & Analysis 3 (Cal. Aug. 28, 2002) ("S.B. 1962") (enacted as 2002 Cal. Stat. 518) ("The law refers to [offers to dedicate] as 'offers' because they have no impact unless a public or nonprofit entity 'accepts' the offer . . . .").

Thus, respondent and the lower court are manifestly wrong in asserting that the County's acceptance "took nothing from the Daniels 'that had not already been taken'" from their predecessors in interest. Opp. 16 (quoting Pet. App. 11a). The County's acceptance stripped petitioners of the right to exclude others – a right petitioners, and their predecessors in interest, retained after the irrevocable offer to dedicate was recorded.[1] Analogizing such an offer to an options contract, *id.* at 15, does not alter the fact that it is only the agency's *exercise* of a right to acquire an easement before an offer to dedicate expires – not the owners' *conferral* of such a time-limited right – that divests the property owner of the right to exclude others.[2]

Nor does *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), support respondent's claim that acceptance of the offer to dedicate worked no deprivation of property. In *Lucas*, the Court noted that assertion of a previously granted *easement* would not constitute a separate taking. See *id.* at

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[1] For this reason, respondent and the lower court are also wrong in asserting that petitioners seek to "'obtain greater rights than those held by their predecessors in interest.'" Opp. 6 (quoting Pet. App. 10a).

[2] Insofar as the Ninth Circuit "presum[ed]" that the full economic loss associated with the taking of the easement occurred before petitioners bought the property, Pet. App. 11a (quoting *Carson Harbor Village Ltd.* v. *City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), *overruled on other grounds by WMX Techs., Inc.* v. *Miller*, 104 F.2d 1133 (9th Cir. 1997) (en banc), that presumption was plainly mistaken. The Ninth Circuit has "presumed" that a property owner "who purchased land *after an alleged taking [occurred]*" suffered no injury because the purchase price "presumably reflected the market value of the property minus the interests taken." *Carson Harbor Village, Ltd.*, 37 F.3d at 476 (emphasis added). Here, however, petitioners bought the property *before* the right to exclude others was taken, and the County offered no evidence that, at the time of that purchase, the price of the property had already been discounted by the full value of an interest not yet taken. In fact, it was by no means certain that any state agency ever would accept the offer to dedicate. *See* Pet. 16-17; *infra* at 7-8. Accordingly, there is no basis whatever for the lower court's economic speculation.

1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."). *Lucas* was careful to note, however, that there is no taking only when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the landowner's] title to begin with." See *id.* at 1027. By contrast, here mere recordation of the offer to dedicate did *not* grant the public an actual easement and did not limit the Trust's ability to exclude others from the property.

In short, petitioners suffered an uncompensated taking of their property in violation of this Court's holdings in *Nollan* and *Dolan*. Not suprisingly, therefore, respondent devotes most of its opposition to procedural arguments designed to shield its unconstitutional conduct from review. None of these arguments has merit.

2a. Respondent argues that petitioners' takings claim is not ripe because petitioners never "'sought "compensation through the procedures the State has provided for doing so."'" Op. at 7 (quoting *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985))). Notably, however, respondent nowhere claims that petitioners could have actually obtained any compensation through any available state procedure. And for good reason: as the remainder of respondent's brief makes clear, and the pending Petition for Writ of Certiorari in *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 3, 2002), confirms, the California courts have erected a procedural bar that completely precludes recovery of just compensation where, as here, one state entity accepts an offer to dedicate that another state entity previously coerced. In such circumstances, the California courts have held that a challenge to any permit condition requiring recordation of an offer to dedicate must be brought within 60 days of the permit decision itself, even though, under controlling California law,

recordation of the offer does not itself deprive the property owner of the right to exclude others, no state entity has made a final decision to deprive the property owner of that right, and such a deprivation is contingent on future events that may never occur. See *Cole* v. *County of Santa Barbara*, No. B147339, 2001 WL 1613856, at *3-*8 (Cal. Ct. App. Dec. 17, 2001) Thus, the lower court's "[a]ssum[ption] that adequate state procedures were available to seek . . . compensation," Pet. App. 8a, was plainly incorrect.

Indeed, it was precisely because the state courts have erected an impermissible procedural bar to valid takings claims that petitioners brought this action under 42 U.S.C. § 1983. Section 1983 was enacted to provide a federal remedy for violations of federal constitutional rights by state officials. See *Felder* v. *Casey*, 487 U.S. 131, 139 (1988). Petitioners invoked this federal remedy in order to obtain an injunction and a declaration of their rights that they could then use in the state courts to compel the County to live up to its obligations under the Fourteenth Amendment. Having successfully urged the California courts to bar review of the very type of takings claim that petitioners assert, see *Cole* v. *County of Santa Barbara*, 2001 WL 1613856, at *3-*8, respondent cannot now claim that petitioners' refusal to engage in a futile attempt to seek compensation in the state courts should prevent this Court from reviewing the County's unconstitutional conduct. Even if petitioners had begun their takings claim in state court, as respondent claims they should have done, Opp. 7, those claims would have ended up before this Court, without any substantive review by any lower state court. See Petition for Writ of Certiorari, *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 3, 2002).

b. Respondent's waiver, res judicata and statute of limitations arguments are equally misguided, and serve only to highlight the fact that the lower court (like the California courts) misapplied federal ripeness principles. Respondent claims that because petitioners' predecessors in interest

"failed" to assert takings claims when the Coastal Commission required these prior owners to record offers to dedicate in 1974, 1978 and 1987, the lower court properly held that the statute of limitations has run on such claims, which, in respondent's view, are barred in any event by principles of waiver and res judicata. Opp. 9-12. Each of these arguments is predicated on the assumption that petitioners' predecessors in interest could have asserted a ripe takings claim years before any state entity finally decided to accept the offer and thereby divest the property owner of the right to exclude others. That assumption is simply mistaken.

This Cout has consistently ruled that a property owner may not pursue a takings claim until there has been a *final* government decision to take the property. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985). Under California law, it is clear that no state agency made a final decision to strip petitioners of their right to exclude others from their property until the County accepted the offer to dedicate in 1998. Any claim seeking redress for a physical taking, therefore, would have been entirely premature in 1974, 1978 and 1987; indeed, at each of these times, and for years afterwards, it remained uncertain whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]"). In fact, it was this very uncertainty that led the California legislature to adopt a law just this summer requiring public agencies to accept all outstanding offers to dedicate. See 2002 Cal. Stat. 518.[3]

As a result of that uncertainty, moreover, recording landowners would have obtained undeserved windfalls under the lower court's erroneous ripeness determination. If a

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[3] Even this law does not remove all uncertainty, inasmuch as it requires acceptance if sufficient funds are available. S.B. 1962, at 1-2.

taking associated with the acceptance of an offer to dedicate an easement ripened at the time an offer was recorded, the recording landowner would be entitled to compensation for the full value of a property loss that might never materialize, or, as happened in this case, that might be suffered by a subsequent property owner. The prospect of such windfalls simply confirms that no final decision had been made in 1974, 1978 or 1987 to divest any of the prior property owners of the right to exclude others, and that such owners could not have asserted ripe takings challenges seeking compensation for a loss that did not occur until 1998. Accordingly, the statute of limitations did not bar petitioners' suit, which was filed within 30 days of the County's decision to accept the offer.

For these same reasons, the fact that petitioners' predecessors in interest "failed" to assert unripe takings challenges to the 1974, 1978 and 1987 actions of the Coastal Commission does not bar petitioners' claim under waiver or res judicata principles. None of the state law cases respondent cites in an attempt to demonstrate otherwise, see Opp. 10-12, involved a challenge to a state entity's *acceptance* of a previously compelled offer to dedicate an easement. Rather, the only state actions at issue in those cases were permit decisions that were alleged to have caused immediate property deprivations, or other immediate injuries.[4] The California courts' determinations in these cases

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[4] *See California Coastal Comm'n* v. *Superior Court*, 258 Cal. Rptr. 567 (Cal. Ct. App. 1989) (post-*Nollan* action seeking to set aside permit condition requiring dedication of an easement in exchange for permit); *Rossco Holdings, Inc.* v. *State*, 260 Cal. Rptr. 736 (Cal. Ct. App. 1989) (same); *Patrick Media Group, Inc.* v. *California Coastal Comm'n*, 11 Cal. Rptr. 2d 824 (Cal. Ct. App. 1992) (inverse condemnation action by billboard owner seeking compensation for off-site billboards that the owner's lessor removed in order to comply with a permit); *Ojavan Investors, Inc.* v. *California Coastal Comm'n*, 32 Cal. Rptr. 2d 103 (Cal. Ct. App. 1994) (action challenging permit conditions that required the owner's predecessor-in-interest to record development restrictions on

that claims seeking redress for such injuries should have been brought in actions challenging the permit decisions themselves have no bearing here, where petitioners seek redress for a taking that did not result from the Coastal Commission's various actions in the 1970s and 1980s, but instead flowed from the County's 1998 decision to accept the offer to dedicate.

3. Finally, respondent's claim that this case raises no important issues of federal law is, at best, unpersuasive, and, at worst, cynical. Petitioners do not ask this Court "to create a new constitutional rule," Opp. 13, but rather to ensure that the County and other agencies throughout the California do not succeeding in flouting the rules this Court announced in *Nollan* and *Dolan*. Indeed, the County nowhere attempts to show that the appropriation of petitioners' property satisfied the nexus and proportionality standards this Court announced in those case. Nor does respondent deny that the Coastal Commission is urging agencies throughout the State to accept hundreds of other soon-to-expire offers to dedicate with full knowledge that virtually none of the resulting easements could satisfy the requirements of the Fifth Amendment. In fact, since the filing of this petition, the California legislature has *mandated* the acceptance of such offers because it recognizes that the Coastal Commission has not been able to coerce new offers since *Nollan*. The Ninth Circuit's failure to put a stop to such open flouting of this Court's rulings is itself an important reason to grant review, not a ground for denying it. See *id.* at 2.

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building sites, including a dedication of an easement); *County of Imperial* v. *McDougal*, 564 P.2d 14 (Cal. 1977) (action challenging a condition in a special permit granted to predecessor in title); *City of Santee* v. *Superior Court*, 279 Cal. Rptr. 22 (Cal. Ct. App. 1991) (action seeking declaration that permit conditions that landowner had accepted were invalid); *Pfeiffer* v. *City of La Mesa*, 137 Cal. Rptr. 804 (Cal. Ct. App. 1977) (inverse condemnation action seeking to recover damages allegedly caused by compliance with permit condition that landowner accepted and never challenged).

Respondent's assertion that petitioners "completely overstate" the importance of these issues because few other landowners will be so "presumptuous" as to "seek to renege on [their] legal obligations," Opp. 13 & n.4, is utterly disingenuous. The Coastal Commission did not attempt to satisfy the nexus and proportionality requirements when it coerced offers to dedicate from property owners prior to 1987, yet it has not hesitated to use extraordinary strong-arm tactics to compel compliance with such coerced offers. See Pet. 4 (explaining threats of heavy fines Coastal Commission used to compel the Bucklews to record an offer to dedicate); Reply Brief of Petitioner at 9 n.5, *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 3, 2002) (describing threats of fines totaling millions of dollars leveled at trustee who challenged validity of 1980 offer to dedicate). These retaliatory tactics, coupled with the California and federal courts' decisions to permit acceptance of illegally coerced offers, ensures that few if any landowners will have the temerity to contest appropriations of easements across their property, no matter how egregious the resulting constitutional violation. Thus, the absence of challenges like the one petitioners have mounted is not evidence that property owners do not object to the unconstitutional appropriation of their property, but merely confirms that the Coastal Commission and local governments are succeeding in thwarting the requirements of *Nollan* and *Dolan*. If this Court denies the petition, these entities will only be further emboldened, and other States can be expected to use California's blueprint for escaping this Court's holdings in *Nollan* and *Dolan*.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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